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## Racial Identity, Electoral Structures, and the First Amendment Right of Association

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# Racial Identity, Electoral Structures, and the First Amendment Right of Association

Guy-Uriel E. Charles

*This Article develops a novel and provocative approach for thinking about the role of race in democratic politics. Professor Charles identifies the Supreme Court's descriptive and normative struggles with racial identity, which have led many on the Court to question the constitutionality of the Voting Rights Act. He relies upon the social identity literature in social psychology, as well as the race and politics literature in political science, to demonstrate empirically the relationship between racial and political identity. He then uses the right of association, particularly as developed by the Supreme Court in the party and ballot access cases, to argue that the First Amendment protects the right of voters of color to associate as voters of color where race and political identity are correlated. In so doing, he characterizes the Court's attempt to grasp the proper role of race in democratic politics as a deeper struggle between equality and liberty values. He concludes by suggesting a framework for balancing liberty and equality concerns in the design of electoral institutions.*

## INTRODUCTION

The Supreme Court's voting rights jurisprudence suffers from an identity crisis. The Court's cases support at least two divergent propositions. In some cases, the Court has intimated that state actors violate the Equal Protection Clause if they justify race consciousness in the design of democratic structures on the assumption that racial identity<sup>1</sup> and political identity<sup>2</sup> are positively correlated.<sup>3</sup> Indeed, at times the Court speaks as if

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1. "Racial identification" is defined as a self-awareness that one belongs to a particular racial group (or groups) and a psychological sense of attachment to that racial group. See PATRICIA GURIN ET AL., HOPE & INDEPENDENCE: BLACKS' RESPONSE TO ELECTORAL AND PARTY POLITICS 75 (1989); Pamela Johnston Conover, *The Role of Social Groups in Political Thinking*, 18 BRIT. J. POL. SCI. 51, 52 (1988).

2. In this Article, "political identification" is primarily defined as party identification, as well as political ideology or orientation such as self-location on a liberal-conservative continuum. See KATHERINE TATE, FROM PROTEST TO POLITICS: THE NEW BLACK VOTERS IN AMERICAN ELECTIONS 64 (1993).

3. See, e.g., *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*) (stating that race-based districting "bears an uncomfortable resemblance to political apartheid"); see also *Bush v. Vera*, 517 U.S. 952, 985

the Fourteenth Amendment demands the eradication of racial identity as a subset of political identity,<sup>4</sup> although it has not explicitly mandated race blindness in the composition of electoral structures.<sup>5</sup> In other cases, however, the Court has maintained that the Fourteenth Amendment is capable of accommodating state action that recognizes race as a basis for political identity.<sup>6</sup> These cases imply that state actors may assume a relationship between racial and political identity and may accordingly take race into account in the design of democratic institutions.<sup>7</sup> These incongruous positions lead to the conclusion that, at best, the Court is genuinely vexed and perplexed by the relationship between racial and political identity.

The mixed message communicated by the Court's voting rights cases is understandable because of the multiple and often crosscutting constitutional values at play in these cases.<sup>8</sup> However, the Court has failed to provide any guidance for resolving the uneasy tension of these coexisting constitutional values. While both the Court and commentators have recognized that race consciousness in the design of democratic structures touches upon Fourteenth Amendment equality considerations,<sup>9</sup> they have

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(1996) (noting that voters are "more than mere racial statistics" and that the Court's "Fourteenth Amendment jurisprudence evinces a commitment to eliminate unnecessary and excessive use and reinforcement of racial stereotypes"); *Miller v. Johnson*, 515 U.S. 900, 914 (1995) (remarking that the assumption that voters of color "share a single political interest" is "the precise use of race as a proxy the Constitution prohibits"); Guy-Uriel E. Charles & Luis Fuentes-Rohwer, *Challenges to Racial Redistricting in the New Millennium: Hunt v. Cromartie As a Case Study*, 58 WASH. & LEE L. REV. 227 (2001); Richard H. Pildes, *Principled Limitations on Racial and Partisan Redistricting*, 106 YALE L.J. 2505 (1997). As used in this Article, the terms "electoral structures," "democratic structures," and "democratic institutions" refer to methods of conducting elections or, more precisely, voting systems. These methods include districting (single member or multiple member), cumulative voting, preference voting, proportional representation, and other types of voting structures. For typologies and definitions of electoral structures, see SAMUEL ISSACHAROFF ET AL., *THE LAW OF DEMOCRACY: LEGAL STRUCTURE OF THE POLITICAL PROCESS* 1089-1131 (2002).

4. See, e.g., *Shaw I*, 509 U.S. at 647 (categorizing as an "impermissible stereotype" any purported relationship between racial and political identity).

5. *Id.* at 642 ("This Court never has held that race-conscious state decision-making is impermissible in all circumstances.").

6. See *Easley v. Cromartie*, 532 U.S. 234 (2001) (*Cromartie II*); *Wright v. Rockefeller*, 376 U.S. 52 (1964); Katharine Inglis Butler, *Redistricting in a Post-Shaw Era: A Small Treatise Accompanied by Districting Guidelines for Legislators, Litigants, and Courts*, 36 U. RICH. L. REV. 137, 216-17 (2002) ("As a practical matter, *Cromartie II* modifies *Vera*'s holding that race cannot be used as a proxy to accomplish other objectives. The distinction between the impermissible use of race in *Vera* and the permissible use in *Cromartie II* appears thin.").

7. See, e.g., *Cromartie II*, 532 U.S. at 241-42; *Thornburg v. Gingles*, 478 U.S. 30 (1986); *United Jewish Orgs. of Williamsburgh, Inc. v. Carey*, 430 U.S. 144, 165 (1977).

8. Although other factors may explain the state of the Court's racial districting cases—see, for example, Samuel Issacharoff and Richard H. Pildes, *Politics as Markets: Partisan Lockups of the Democratic Process*, 50 STAN. L. REV. 643, 644, 716 (1998) (noting that judicial involvement in democratic politics has not often been accompanied or animated by a constitutional theory of democratic politics)—this Article argues that one of the Court's primary problems in the racial districting cases is coming to terms with the proper role of race in democratic politics.

9. For example, Justice O'Connor stated in *Shaw I* that "[c]lassifications of citizens solely on the basis of race 'are by their very nature odious to a free people whose institutions are founded upon

ignored important and sometimes countervailing liberty interests under the First Amendment.<sup>10</sup> Hence, the Court's voting rights jurisprudence and the scholarly literature have focused on the Equal Protection Clause and its equality concerns, to the exclusion of the First Amendment and its attendant liberty concerns.<sup>11</sup>

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the doctrine of equality.” *Shaw I*, 509 U.S. at 643 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). She also noted that “[l]aws that . . . distinguish between individuals on racial grounds fall within the core” of the Equal Protection Clause’s prohibition “that ‘[n]o state . . . deny to any person within its jurisdiction the equal protection of the laws.’” *Id.* at 642 (quoting U.S. CONST., amend. XIV, § 1).

10. Notable exceptions include James U. Blacksher, *Dred Scott's Unwon Freedom: The Redistricting Cases as Badges of Slavery*, 39 HOW. L.J. 633, 687 (1996); Terry Smith, *A Black Party? Timmons, Black Backlash and the Endangered Two-Party Paradigm*, 48 DUKE L.J. 1, 56 & n.243 (1998). The tension between First Amendment values and equal protection values has gone unnoticed in the context of voting rights, but it exists in other contexts as well. Commentators have observed this tension in several domains. Affirmative Action: See Jim Chen, *Diversity and Damnation*, 43 UCLA L. REV. 1839, 1846 (1996) (“The prevailing equal protection paradigm has long since dissipated any useful intellectual energy directed toward solving the conundrum of affirmative action. Rather, the proper solution lies in reexamining official raceconsciousness through the lens of speech.”). School Desegregation: See Herbert Wechsler, *Toward Neutral Principles of Constitutional Law*, 73 HARV. L. REV. 1, 34 (1959) (“[T]he question posed by state-enforced segregation is not one of discrimination at all. Its human and its constitutional dimensions lie entirely elsewhere, in the denial by the state of freedom to associate, a denial that impinges in the same way on any groups or races that may be involved.”). But see Charles L. Black Jr., *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 412, 428-29 (1960); Derrick A. Bell Jr., Comment, *Brown v. Board of Education and the Interest-Convergence Dilemma*, 93 HARV. L. REV. 518, 522 (1980) (“To doubt that racial segregation is harmful to blacks, and to suggest that what blacks really sought was the right to associate with whites, is to believe in a world that does not exist now and could not possibly have existed then.”). Hate Speech: See Robert C. Post, *Racist Speech, Democracy, and the First Amendment*, 32 WM. & MARY L. REV. 267 (1991); Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484. But see Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982); Charles R. Lawrence III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431; Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (1989). Sexual Orientation: See Dale Carpenter, *Expressive Association and Anti-Discrimination Law After Dale: A Tripartite Approach*, 85 MINN. L. REV. 1515 (2001); Nan D. Hunter, *Accommodating the Public Sphere: Beyond the Market Model*, 85 MINN. L. REV. 1591 (2001); Nan D. Hunter, *Identity, Speech, and Equality*, 79 VA. L. REV. 1695 (1993).

11. To be sure, the relevant literature is quite insightful on other aspects of the Court's doctrine. Some scholars have focused on the coherence, or lack thereof, of the Court's racial gerrymandering doctrine. See Peter J. Rubin, *Reconnecting Doctrine and Purpose: A Comprehensive Approach to Strict Scrutiny After Adarand and Shaw*, 149 U. PA. L. REV. 1 (2000); Jeffrey G. Hamilton, Comment, *Deeper into the Political Thicket: Racial and Political Gerrymandering and the Supreme Court*, 43 EMORY L.J. 1519 (1994). Other scholars have directed their criticism at the widespread perception that the Court has not identified a constitutional harm sufficient to justify the constitutionalization of race-conscious districting. See Richard Briffault, *Race and Representation After Miller v. Johnson*, 1995 U. CHI. LEGAL F. 23; A. Leon Higginbotham et al., *Shaw v. Reno: A Mirage of Good Intentions with Devastating Racial Consequences*, 62 FORDHAM L. REV. 1593 (1994); Melissa L. Saunders, *Reconsidering Shaw: The Miranda of Race-Conscious Districting*, 109 YALE L.J. 1603 (2000). Still others have debated the rationality of the Court's decision to grant standing to indistricted plaintiffs. See Samuel Issacharoff & Thomas C. Goldstein, *Identifying the Harm in Racial Gerrymandering Claims*, 1 MICH. J. RACE & L. 47 (1996); Pamela S. Karlan & Daryl J. Levinson, *Why Voting Is Different*, 84 CALIF. L. REV. 1201 (1996); Judith Reed, *Sense and Nonsense: Standing in the Racial Districting Cases as a Window on the Supreme Court's View of the Right to Vote*, 4 MICH. J. RACE &

Of equal importance, the Court's failure to appreciate the several constitutional values at issue in the voting rights cases has hampered its ability to think more broadly about the structure and content of democratic politics.<sup>12</sup> In particular, the Court's voting rights jurisprudence fails to specify whether the types of political rights at issue in the racial gerrymandering cases present a "race" problem and are therefore subject to its traditional equal protection jurisprudence or whether they are an "analytically distinct" something else.<sup>13</sup> Consequently, the attempt to filter most questions of democratic politics solely through the two words "equal protection" is limiting, limitless, and ultimately unproductive.<sup>14</sup>

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L. 389, 456 (1999); Bradley David Wine, *Can You Get to Kings County from Interstate 85? A Reevaluation of United Jewish Organizations v. Carey in Light of Shaw v. Reno*, 19 VT. L. REV. 843 (1995). "Indistricted" is a term Issacharoff and Goldstein coined to distinguish individuals who have standing to assert a *Shaw* claim because officials took race into account in the design of their districts from those whose district lines were indirectly affected by the decision to create a race-conscious district elsewhere. Issacharoff & Goldstein, *supra*. Finally, many scholars have decried the Court's individualist conception of the right to vote. See Kathryn Abrams, "Raising Politics Up": *Minority Political Participation and Section 2 of the Voting Rights Act*, 63 N.Y.U. L. REV. 449 (1988); Vikram David Amar & Alan Brownstein, *The Hybrid Nature of Political Rights*, 50 STAN. L. REV. 915 (1998); Heather K. Gerken, *Understanding the Right to an Undiluted Vote*, 114 HARV. L. REV. 1663 (2001); Pamela S. Karlan, *Politics by Other Means*, 85 VA. L. REV. 1697, 1716 (1999); Reed, *supra*; James Thomas Tucker, *Affirmative Action and [Mis]representation, Part II: Deconstructing the Obstructionist Vision of the Right to Vote*, 43 HOW. L.J. 405, 456 (2000).

12. Professor Amar makes a similar observation in an analogous context. See Akhil Reed Amar, *The Case of the Missing Amendments: R.A.V. v. City of St. Paul*, 106 HARV. L. REV. 124 (1992). Commenting on the Justices' failure to read the Constitution holistically in deciding on the constitutionality of an ordinance preventing cross burning, he stated:

All nine Justices analyzed cross burning and other forms of racial hate speech by focusing almost exclusively on the First Amendment. They all seemed to have forgotten that it is a *Constitution* they are expounding, and that the Constitution contains not just the First Amendment, but the Thirteenth and Fourteenth Amendments as well.

*Id.* at 125.

The Court is not the only institution to have ignored the relationship between the First and Fourteenth Amendments in the design of democratic structures. As Professor Chen has observed, "election law specialists typically analyze [election law problems] . . . in complete isolation from other legal means for enhancing communicative or political diversity." Chen, *supra* note 10, at 1870.

13. Charles & Fuentes-Rohwer, *supra* note 3, at 284 ("This lack of clarity is due in part to the fact that the Court as an institution is agnostic with respect to whether these cases are about race or whether they are about politics.").

14. See ROBERT B. MCKAY, REAPPORTIONMENT: THE LAW AND POLITICS OF EQUAL REPRESENTATION 215 (1965):

The equal protection of the laws clause of the fourteenth amendment is not self-defining; it does not even speak with a single voice. Rather it provides a vessel into which can be poured interpretations of the command for equality appropriate to the varied contexts in which the concept of equality may apply.

*Id.*; Bernard Williams, *The Idea of Equality*, in PHILOSOPHY, POLITICS & SOCIETY 110, 111 (P. Laslett & W. Runciman eds., 1962); Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537 (1982). Consider also *Bush v. Gore*, 531 U.S. 98 (2000) (per curiam) (holding that recount ordered by Florida Supreme Court violated the Equal Protection Clause), in this context. By most accounts, *Bush v. Gore* represents a novel and potentially expansive application of the Equal Protection Clause. The per curiam recognized the possible implications of its ruling and attempted to contain the potentially limitless applications of equal protection to the various inequalities in the election process by proclaiming that "[o]ur consideration is limited to the present circumstances, for the problem of equal protection in

In this Article I explore dimensions of the role of race in democratic politics that the Court has ignored by focusing on equal protection interests. In particular, I suggest the First Amendment as an alternative constitutional basis for thinking about the relationship between race and democratic politics in constitutional law.<sup>15</sup> I argue that voters of color have a First Amendment interest in associating politically when their racial identity overlaps with their political identity.<sup>16</sup> As a consequence of this right of political association, taking race into account in the composition of democratic structures constitutes a compelling state interest under the Fourteenth Amendment. Accordingly, where racial identity is associated with political identity, the Supreme Court should permit state actors to take race into account in the design of democratic institutions.<sup>17</sup>

Part I surveys the Court's racial districting cases and argues that the Court's racial districting jurisprudence can best be understood by making explicit the Court's presuppositions about racial identity. Part II draws upon the social identity literature in social psychology to argue that the Court's assumptions about racial identity are inconsistent with what we know about social and racial identity formation. This Part also relies upon the race and politics literature in political science and draws upon the political experiences of African Americans to demonstrate empirically the role race plays in American politics. Part III explores the Court's political association cases and contends that they are relevant to the question of race

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election processes generally presents many complexities." *Id.* at 109. Note also that the per curiam did not purport to take issue with the many inequalities involved in the administration of elections. Rather, it attempted to cabin the issue to "a situation where a state court with the power to assure uniformity has ordered a statewide recount with minimal procedural safeguards." *Id.* In these situations "there must be at least some assurance that the rudimentary requirements of equal treatment and fundamental fairness are satisfied." *Id.* The Court attempted to contain the potentially limitless reach of a formalistic equal protection analysis by drawing an arbitrary line that is ultimately unproductive to understanding inequality in the political process.

15. To be clear, I do not argue that simply switching constitutional provisions would automatically change the outcome in the redistricting case. My argument on this score is two-fold. First, the claims presented in the *Shaw* line of cases are associational claims. However, these cases do not fit very well as equal protection claims. Second, the Court has thought more deeply about associational rights in the First Amendment context. The First Amendment right of association provides us with a more useful and robust framework for thinking about the relationship among race, association, and political rights.

16. One methodological note: Although this Article is particularly concerned with the First Amendment implications of the Court's voting rights cases on the associational rights of voters of color, the arguments advanced need not be limited to voters of color. They are applicable to any group, racial or otherwise, whose social identity is politically salient. In addition to an independent concern with the political rights of voters of color, the perspective of voters of color is a useful heuristic for exploring these important and interesting constitutional questions. Thus, the arguments propounded in this Article apply whenever a relevant social characteristic is correlative with political identity. See *infra* text accompanying notes 423-26.

17. It is important to clarify here what I am not arguing. I am not claiming that voters of color have rights to a majority-minority district or a district of their own. Rather, I am arguing that the First Amendment entitles racial groups to participate meaningfully in the political process as racial groups, where race is politically salient.

and representation. This Part also argues that the political association cases are applicable to the design of electoral structures and demonstrates how the design of electoral structures might unconstitutionally burden the individual's right of political association. Part III concludes that voters of color have a right of political association when race and political identity are correlated and have an attendant claim against the state when the design of electoral structures would unduly and negatively affect their ability to aggregate their political power. Part IV argues that the equality interest is not so sufficiently compelling that it should automatically trump the individual's liberty right. Part V addresses the implications of the arguments advanced in this Article. In particular, Part V discusses the limits of the associational right and presents some guidance for resolving the tension between liberty and equality in the racial districting cases. This Part also explains how districting often impedes the individual's ability to associate with like-minded others, thereby frustrating the individual's First Amendment right. Although this Article argues that race is a proper basis for state action in democratic politics, it specifies when and how race should matter in adjudicating political rights. The Article concludes by proposing that where the political and racial identities of a racial group intersect—that is, where racial and political identification are positively correlated—race is a proper consideration of state action in electoral politics.

## I

### UNDERLYING PREMISES OF RACIAL DISTRICTING CASES

The Court's modern voting rights revolution began with *Shaw v. Reno* (*Shaw I*).<sup>18</sup> In *Shaw I*, the Court held that a plaintiff could maintain a cause of action under the Equal Protection Clause when a state engages in racial gerrymandering—that is, when it intentionally includes or excludes voters within legislative districts on the basis of racial considerations. More specifically, the Court concluded that “redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting” is justiciable under the Fourteenth Amendment.<sup>19</sup> Although the Court has yet to settle upon a single theory that explains why race-conscious redistricting violates the Fourteenth Amendment, the Court's subsequent voting rights cases have not retreated from *Shaw I*'s conclusion that race-conscious redistricting implicates equality concerns under the Fourteenth Amendment.<sup>20</sup>

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18. 509 U.S. 630 (1993).

19. *Id.* at 642, 658.

20. For a thorough exposition, see Charles & Fuentes-Rohwer, *supra* note 3, at 235-53; Rubin, *supra* note 11.



Understanding the Court's reactions to race-influenced electoral structures and racial identity requires interpreting admittedly cryptic and meager clues. Nevertheless, the Court's doctrine provides some illuminating guidelines once unpacked. Using the Court's equal protection and voting rights jurisprudence, this Part sorts through the Court's enigmatic pronouncements on racial identity and reveals four premises that underlie the Court's decisions. First, the Court is skeptical that racial identity exists. Second, the Court is concerned that state action on the basis of racial identity is essentialist. Third, when the Court is willing to assume that racial identity is a significant feature of the social landscape, with political implications, it then also concludes that racial identity is a political construction imposed by political elites who are cynically manipulating the electorate. Fourth, the Court's reaction to racial identity presupposes that the Court, under the aegis of judicial review, can minimize the effect of racial identity on the political landscape.

#### A. *Skepticism About the Existence of Racial Identity*

What is it about the intentional aggregation of voters of color into voting districts that the Court finds constitutionally objectionable and "so irrational on its face that it immediately offends principles of racial equality"?<sup>21</sup> The Court's negative reaction to state action on the basis of racial identity is based in part upon a deep skepticism that racial identity in fact exists.<sup>22</sup> That is, as a matter of empirical fact, the Court is unconvinced that individuals define themselves on the basis of their race and that this self-definition has real political and social implications.<sup>23</sup> Thus, in *Shaw I*, the Court maintained:

A reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may

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21. *Shaw I*, 509 U.S. at 652. The Court also asserted:

Today we hold only that appellants have stated a claim under the Equal Protection Clause by alleging that the North Carolina General Assembly adopted a reapportionment scheme so irrational on its face that it can be understood only as an effort to segregate voters into separate voting districts because of their race, and that the separation lacks sufficient justification.

*Id.* at 658.

22. See generally Karlan & Levinson, *supra* note 11, at 1216-17 (discussing how *Shaw* and *Miller* evidence the Court's misunderstanding of the relationship between race and politics); John A. Powell, *The Colorblind Multiracial Dilemma: Racial Categories Reconsidered*, 31 U.S.F. L. REV. 789, 790-91 (1997) (identifying and criticizing this skepticism).

23. Voting rights is not the only area in which the Court has expressed skepticism about racial identity claims. At least one scholar has recognized a similar phenomenon in the Court's school desegregation jurisprudence. See Alex M. Johnson Jr., *Bid Whist, Tonk, and United States v. Fordice: Why Integrationism Fails African-Americans Again*, 81 CALIF. L. REV. 1401, 1403 (1993) ("[T]he courts are embracing a social reality that does not exist: a society in which race is viewed as an irrelevant characteristic.").

have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. It reinforces the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.<sup>24</sup>

Similarly, in *Miller v. Johnson*, the Court stated:

It is true that redistricting in most cases will implicate a political calculus in which various interests compete for recognition, but it does not follow from this that individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain “minority views” that must be different from those of other citizens, the precise use of race as proxy the Constitution prohibits.<sup>25</sup>

The Court’s characterization of racial identity arguments in the voting rights cases further illustrates its skepticism. The Court portrays these arguments not only as based upon a claim that “members of the same racial and ethnic groups . . . think alike,”<sup>26</sup> but also as reflecting impermissible “assumptions,”<sup>27</sup> “notion[s],”<sup>28</sup> “perceptions,”<sup>29</sup> or “stereotypes.”<sup>30</sup> The Court implies that the claim of racial identity does not have any basis in fact and need not be taken seriously.

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24. *Shaw I*, 509 U.S. at 647.

25. 515 U.S. 900, 914 (1995) (internal citations omitted). These sentiments are reflected in the Court’s subsequent voting rights cases. For example, in *Vera* the Court stated:

Legislators and district courts nationwide have modified their practices—or, rather, reembraced the traditional districting practices that were almost universally followed before the 1990 census—in response to *Shaw I*. Those practices and our precedents, which acknowledge voters as more than mere racial statistics, play an important role in defining the political identity of the American voter. Our Fourteenth Amendment jurisprudence evinces a commitment to eliminatc unnecessary and excessive governmental use and reinforcement of racial stereotypes.

*Bush v. Vera*, 517 U.S. 952, 985 (1996). *See also* *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 636 (1990) (Kennedy, J., dissenting) (objecting to the “demeaning notion that members of the defined racial groups ascribe to certain ‘minority views’ that must be different from those of other citizens”).

26. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 903 (1994) (Thomas, J., concurring); *Shaw I*, 509 U.S. at 647–48.

27. *Miller*, 515 U.S. at 914; *Shaw I*, 509 U.S. at 678; *Metro Broad.*, 497 U.S. at 571 (Stevens, J., dissenting).

28. *Miller*, 515 U.S. at 914 (quoting *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting)); *Johnson v. DeGrandy*, 512 U.S. 997, 1027 (1994); *Shaw I*, 509 U.S. at 648.

29. *Shaw I*, 509 U.S. at 647.

30. “But where the State assumes from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls,’ it engages in racial stereotyping at odds with equal protection mandates.” *Miller*, 515 U.S. at 920 (quoting *Shaw I*, 509 U.S. at 647); *see also id.* at 912, 914, 928.

Justice Thomas's forceful and eloquent concurrence in *Holder v. Hall* succinctly captures this skepticism.<sup>31</sup> There, Justice Thomas maintained that the constitutionality of majority-minority districts<sup>32</sup> rests upon a "working assumption that racial groups can be conceived of largely as political interest groups."<sup>33</sup> Challenging this working assumption on descriptive grounds, Justice Thomas concluded that there is no evidence that "race itself determines a distinctive political community of interest."<sup>34</sup> Thus, majority-minority districts, or, as Justice Thomas described it, "our drive to segregate political districts by race," necessarily rests upon an implicit assumption "that members of racial and ethnic groups . . . all think alike."<sup>35</sup> For Justice Thomas and the Court, this assumption is incorrect as an empirical matter.<sup>36</sup>

### B. Individualism and Opposition to Race Essentialism

As a consequence of its skeptical reaction to racial identity claims, the Court and opponents of race-conscious districting frequently have concluded that race-conscious districting is inconsistent with the Constitution's equality norm. This norm, we are told, demands that "[g]overnment . . . treat citizens 'as individuals, not as simply components of a racial, religious, sexual or national class.'"<sup>37</sup> Along similar lines, members of the Court are fond of quoting Justice Douglas in *Wright v. Rockefeller*: it is the "individual [who] is important, not his race, his creed, or his color."<sup>38</sup> On this view, a fundamental problem with a reapportionment process that accounts for race is the failure of state actors to treat individuals as individuals.

The Court has characterized the repair to an individualistic understanding of voting and representation as the "antiessentialism factor" in the voting rights cases.<sup>39</sup> "Essentialism" is the "attribution of political or

31. 512 U.S. 874, 891 (1994) (Thomas, J., concurring).

32. A majority-minority district is a district in which the majority of voters are citizens of color.

33. *Holder*, 512 U.S. at 905 (Thomas, J., concurring).

34. *Id.* at 904.

35. *Id.* at 903, 907.

36. *Id.* at 903-08. The assumption is also unpalatable to the Court as a normative matter. Justice Thomas explains that even if we discovered evidence of political identification on the basis of race, allocating political power on that basis "should be repugnant to any nation that strives for the ideal of a color-blind Constitution." *Id.* at 905-06.

37. *Miller v. Johnson*, 515 U.S. 900, 911 (1995) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 602 (O'Connor, J., dissenting)) (internal quotations omitted).

38. 376 U.S. 52, 66 (1964). Justice Douglas went on to note that the "principle of equality is at war with the notion that District A must be represented by a Negro, as it is with the notion that District B must be represented by a Caucasian, District C by a Jew, District D by a Catholic, and so on." *Id.* See, e.g., *Holder*, 512 U.S. at 906 (Thomas, J., concurring) (quoting Justice Douglas in *Wright*); *Shaw v. Reno*, 509 U.S. 630, 648 (1993) (*Shaw I*) (same); *City of Mobile v. Bolden*, 446 U.S. 55, 89 (1980) (Stevens, J., concurring) (same).

39. T. Alexander Aleinikoff & Samuel Issacharoff, *Race and Redistricting: Drawing Constitutional Lines After Shaw v. Reno*, 92 MICH. L. REV. 588, 615-18 (1993).

cultural views to persons based simply on their race[, which] denies persons recognition and treatment based upon their individual characteristics."<sup>40</sup> The antiessentialism principle attempts to limit the state's ability to ascribe a political identity to an individual on the basis of the individual's group identity.

There are at least two ways to make sense of the Court's concern with essentialism in the voting rights cases. On the one hand, the Court may be expressing a strong affinity for individualized determinations. In that case, the state must determine each voter's political interests and political identity in an individualized manner. On the other hand, the Court may be expressing a concern with "value reductionism," the process by which one legitimate value comes to dominate all others.<sup>41</sup> In that case, the state reduces the individual's identity to "one unalterable characteristic."<sup>42</sup>

Justice Powell's opinion in *Regents of the University of California v. Bakke* nicely illustrates both aspects of the Court's concern with individualism.<sup>43</sup> According to Justice Powell, the constitutional defect inherent in the admissions program at the University of California at Davis was its failure to treat each applicant as an individual.<sup>44</sup> He wrote that the "denial to respondent of this right to individualized consideration without regard to his race is the principal evil of petitioner's special admissions program."<sup>45</sup> He described individualized determination as the need to apply the same criteria to each applicant. A lack of individualized determination distinguished the constitutionally infirm admissions program at Davis from the Harvard and Princeton programs.

Consider now a second aspect of the Court's concern with essentialism: state-imposed limitations on the individual's ability to self-define. As Professor Martha Minow has observed, "[g]overnmental—and personal—preoccupation with group identity works to hide each person's uniqueness, membership in multiple groups, and subjection by the incoherencies of group-based notions."<sup>46</sup> Justice Powell's opinion in *Bakke* also reflects this concern. As Justice Powell stated with respect to the Harvard admissions program:

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40. *Id.* at 615. See also Gerken, *supra* note 11, at 1718-19. The concern with essentialism, though problematic, makes sense within the equal protection context. See Nan D. Hunter, *Escaping the Expression-Equality Conundrum: Toward Anti-Orthodoxy and Inclusion*, 61 OHIO ST. L.J. 1671, 1688 (2000).

41. Richard H. Pildes & Richard G. Niemi, *Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno*, 92 MICH. L. REV. 483, 500 (1993).

42. Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 903 & n.124 (1995).

43. 438 U.S. 265 (1978).

44. *Id.* at 318 & n.52.

45. *Id.* at n.52.

46. Martha Minow, *Not Only for Myself: Identity, Politics, and Law*, 75 OR. L. REV. 647, 673 (1996).

The file of a particular black applicant may be examined for his potential contribution to diversity without the factor of race being decisive when compared, for example, with that of an applicant identified as an Italian-American if the latter is thought to exhibit qualities more likely to promote beneficial educational pluralism. Such qualities could include exceptional personal talents, unique work or service experience, leadership potential, maturity, demonstrated compassion, a history of overcoming disadvantage, ability to communicate with the poor, or other qualifications deemed important. In short, an admissions program operated in this way is flexible enough to consider all pertinent elements of diversity in light of the particular qualifications of each applicant, and to place them on the same footing for consideration, although not necessarily according them the same weight.<sup>47</sup>

Put differently, Justice Powell objected to the state precluding individuals from opting in and opting out of the applicable evaluative criteria and thus circumscribing their right to self-define.<sup>48</sup> He found the state's assumption in *Bakke*—that white applicants could not contribute to the educational diversity of the medical school—normatively and empirically unacceptable. Justice Powell also objected to the state's assumption that all applicants of color would contribute to the educational diversity of the school. In other words, for Justice Powell, state action on the basis of race diminishes a complex and multifaceted existence to a single characteristic (race) and (arbitrarily) defines individuals on that basis.<sup>49</sup>

The first aspect of antiessentialism—a concern with individualized decision making—translates very poorly to the voting rights context.

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47. *Bakke*, 438 U.S. at 317.

48. Justice Powell maintained:

[T]he Davis special admissions program involves the use of an explicit racial classification never before countenanced by this Court. It tells applicants who are not Negro, Asian, or Chicano that they are totally excluded from a specific percentage of the seats in an entering class. No matter how strong their qualifications, quantitative and extracurricular, including their own potential for contribution to educational diversity, they are never afforded the chance to compete with applicants from the preferred groups for the special admissions seats. At the same time, the preferred applicants have the opportunity to compete for every seat in the class.

The fatal flaw in petitioner's preferential program is its disregard of individual rights as guaranteed by the Fourteenth Amendment.

*Id.* at 319-20.

49. Minow, *supra* note 46, at 653. Professors Pildes and Niemi refer to this process in an analogous context as "value reductionism." Pildes & Niemi, *supra* note 41, at 500. For Professors Pildes and Niemi:

When race becomes the single dominant value to which the process subordinates all others, however, it triggers *Shaw*. For the Court, what distinguishes "bizarre" race-conscious districts is the signal they send out that, to government officials, race has become paramount and dwarfed all other, traditionally relevant criteria. This view is the foundation of the qualitative distinction central to *Shaw*: at a certain point, the use of race can amount to value reductionism that creates the social impression that one legitimate value has come to dominate all others.

*Id.* at 501.

Individualized determination does not fit with the current system of aggregating voters and is not a realistic option.<sup>50</sup> The question is not whether, but rather by which characteristics, to aggregate voters.<sup>51</sup>

The second aspect of antiessentialism—protecting the individual's right to self-define—is sensible in the voting rights context. The voting rights cases are clearly concerned with the state's power to define the individual in a manner inconsistent with the individual's own self-definition.<sup>52</sup> The Court is also concerned with the use of race as the sole or determinative definitional criterion.<sup>53</sup> The Court stated in *Miller v. Johnson* that "[r]ace-based assignments 'embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts—their very worth as citizens—according to a criterion barred to the Government by history and the Constitution.'"<sup>54</sup> The Court went on to note that these are the very stereotypical assumptions the Equal Protection Clause forbids.<sup>55</sup> Thus, for the Court, political identity cannot be assumed from racial identity. In other words, voters who share racial identity do not necessarily share political interests.<sup>56</sup> To assume a correlation is to engage in a form of impermissible essentialism.

Importantly, the constitutional objection to race-conscious districting is not only that the state defines the individual on the basis of an arbitrary characteristic but also that the state chooses the characteristic.<sup>57</sup> Hence, state action here is essentialist both because the state chooses to elevate one arguably irrelevant characteristic above all others and because the state does the choosing.<sup>58</sup> The proposition that voters should be treated as

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50. Karlan & Levinson, *supra* note 11, at 1204.

51. *Id.*

52. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*); Gerken, *supra* note 11, at 1727-28.

53. Professor Katz argued that the Court appeared to have engaged in a similar analysis in *Rice v. Cayetano*, 528 U.S. 945 (2000). See Ellen Katz, *Race and the Right to Vote After Rice v. Cayetano*, 99 MICH. L. REV. 491, 495 (2000) (noting that *Rice* asserts that race-based electorate definitions defeat the primary benefits of political participation).

54. 515 U.S. 900, 912 (1995) (quoting *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 604 (1995) (O'Connor, J., dissenting)).

55. *Id.* at 914.

56. *Id.* ("The view that they do [have the same interests] is 'based on the demeaning notion that members of the defined racial groups ascribe to certain "minority views" that must be different from those of other citizens,' the precise use of race as a proxy the Constitution prohibits." *Id.* (quoting *Metro Broad.*, 497 U.S. at 636 (Kennedy, J., dissenting) (citations omitted)).

57. See Issacharoff, *supra* note 42, at 903 (stating that "the act of assigning representation on the basis of what state authorities determine to be the defining feature of a citizen's existence is necessarily problematic"); see also IAN F. HANEY LÓPEZ, *WHITE BY LAW: THE LEGAL CONSTRUCTION OF RACE* (1996); Christopher A. Ford, *Administering Identity: The Determination of "Race" in Race-Conscious Law*, 82 CALIF. L. REV. 1231 (1994).

58. Aleinikoff and Issacharoff note that "[t]he official line drawers roam around the state identifying members of protected groups in an effort to gather up enough voters of the appropriate race to form an electoral majority." Aleinikoff & Issacharoff, *supra* note 39, at 615; see also Karlan & Levinson, *supra* note 11, at 1217 (stating that "race operates primarily as an external ascription of a particular identity to the minority group by the majority").

individuals need not only involve separate and individualized determination of each voter's interests and identities. The proposition can also be concerned with the individual's right to self-define and to have the state categorize him or her by a characteristic the individual finds salient. This state categorization is precisely the basis of the plaintiffs' complaint in *Shaw I* and its progeny. The state chose to define them and it chose to do so on the basis of an arbitrary characteristic (race) that the plaintiffs did not find politically salient.<sup>59</sup>

### C. *The Role of Political Elites in Constructing Racial Identity*

If the Court is suspicious of the claim that political behavior is in part a function of racial identity and if the Court is concerned that state action on the basis of racial identity is essentialist, how does it explain the political reality of race-conscious districting, or, in Justice Thomas's formulation, "our drive to segregate political districts by race"?<sup>60</sup> For the most part, the Court has left this question unanswered. On the rare occasions when it has been willing to acknowledge the existence and political consequence of racial identity, the Court has often explained it away as a construction of political elites. That is, the Court sees political elites as sardonically manipulating the electoral lines and engendering an artificial difference that is exogenous to the political process by aggregating individuals on the basis of an arbitrary characteristic.<sup>61</sup>

*Miller v. Johnson*<sup>62</sup> provides an apt example of the Court's understanding of the role that political elites play in shaping racial and political identity.<sup>63</sup> The central question in *Miller* was whether the state of Georgia articulated a sufficiently compelling interest for its admitted intent to create a majority-black district, the Eleventh District.<sup>64</sup> The state justified the

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59. *Shaw v. Reno*, 509 U.S. 630, 641-42 (1993) (*Shaw I*); see also Karlan & Levinson, *supra* note 11, at 1214 ("The plaintiffs in the wrongful districting cases were not really protesting their exclusion from anything. Rather, they were protesting the *inclusion* of too many nonwhite voters in the district to which they were assigned.").

60. *Holder v. Hall*, 512 U.S. 874, 907 (1994) (Thomas, J., concurring); see also CAROL M. SWAIN, *BLACK FACES, BLACK INTERESTS: THE REPRESENTATION OF AFRICAN AMERICANS IN CONGRESS* 47-73 (1995).

61. Professors Aleinikoff and Issacharoff describe this process perfectly:

In a democratic society, the purpose of voting is to allow the electors to select their governors. Once a decade, however, that process is inverted, and the governors and their political agents are permitted to select their electors. Through the process of redistricting, incumbent office holders and their political agents choose what configuration of voters best suits their political agenda. The decennial redistricting battles reveal the bloodsport of politics, shorn of the claims of ideology, social purpose, or broad policy goals. Redistricting is politics pure, fraught with the capacity for self-dealing and cynical manipulation.

Aleinikoff & Issacharoff, *supra* note 39, at 588.

62. 515 U.S. 900, 920-27 (1995).

63. Daniel Hays Lowenstein, *You Don't Have to Be Liberal to Hate the Racial Gerrymandering Cases*, 50 STAN. L. REV. 779 (1998).

64. 515 U.S. at 920-27.

intentional creation of three majority-black districts, in particular the Eleventh District, by citing a need to comply with Section 5 of the Voting Rights Act (VRA).<sup>65</sup> The Court rejected this justification on the grounds that Section 5 did not require enacting the Eleventh District.<sup>66</sup> Relying upon its earlier delineation of the requirements of Section 5 in *Beer v. United States*,<sup>67</sup> the Court maintained that a state violates Section 5 when it enacts a retrogressive plan that decreases the electoral prospects of voters of color<sup>68</sup> but not when an ameliorative plan increases the electoral prospects of voters of color by increasing the number of majority-minority districts.<sup>69</sup> The Court remarked that the plan first submitted by the state to the Department of Justice (DOJ) increased the number of majority-black districts from one to two.<sup>70</sup> Consequently, the Court held that the plan could not have violated Section 5 of the VRA.

In reaching this conclusion, the Court said that the redistricting plan was necessary to obtain the approval of the DOJ, even though the Act did not require it. More specifically, the Court noted that the DOJ refused to preclear the state's second plan because the DOJ wanted the state to adopt the American Civil Liberty Union's (ACLU's) "max-black" plan, which contained three majority-black districts.<sup>71</sup> The Court concluded that "[t]here is little doubt that the State's true interest in designing the Eleventh District was creating a third majority-black district to satisfy the Justice Department's preclearance demands."<sup>72</sup>

However, this conclusion is not wholly accurate. As Professor Laughlin McDonald has argued, Georgia could have defended the Eleventh District on a number of grounds—eradicating the effects of past discrimination, avoiding vote dilution, avoiding litigation, and complying with the civil rights laws—yet it failed to do so.<sup>73</sup>

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65. 42 U.S.C. §§ 1973-73p (1994). Section 5 of the VRA requires that certain jurisdictions, states and localities, must first preclear changes in voting procedure before those changes are implemented. 42 U.S.C. § 1973c; see also *Beer v. United States*, 425 U.S. 130, 138 (1976). Those jurisdictions that are covered by Section 5 can either obtain prior approval from the DOJ or seek a declaratory judgment from the United States District Court for the District of Columbia. 42 U.S.C. § 1973c.

66. *Miller*, 515 U.S. at 921.

67. 425 U.S. 130 (1976).

68. *Id.* at 141.

69. *Miller*, 515 U.S. at 923.

70. *Id.* at 906, 921-27. Although the Court did not explicitly discuss Section 2 of the VRA in *Miller*, it did intimate that Section 2 could not have barred preclearance. See *id.* at 906 (recognizing the "absence of any evidence of an intent to discriminate against minority voters" from the state's first plan).

71. *Id.* at 907.

72. *Id.* at 921; see also *id.* at 907 ("Twice spurned, the General Assembly set out to create three majority-minority districts to gain preclearance.").

73. Laughlin McDonald, *Can Minority Voting Rights Survive Miller v. Johnson?*, 1 MICH. J. RACE & L. 119, 129-31 (1996). McDonald speculated that the state's reason for failing to argue that it had a compelling interest in eradicating the present effects of past discrimination, and that it had a compelling interest in complying with the civil rights laws (specifically Section 2 of the VRA), was



The ultimate configuration of the Eleventh District was undeniably influenced by the existence of alternative redistricting plans, such as the Black Caucus/ACLU and Senate plans, and by the section 5 objections of the Attorney General. But just as undeniably, the Eleventh District was conceived and first enacted as a majority-Black district by the Georgia legislature itself, prior to any direct intervention by the Attorney General.<sup>74</sup>

As a consequence of Georgia's "half-hearted defense of its congressional districting plan in *Miller*,"<sup>75</sup> the Supreme Court was left to speculate on the state's motives. The Court supplied a rationale for the state's action—that the DOJ insisted upon pursuing a policy of maximizing majority-black districts—rather than finding that the state had drawn majority-minority districts for racial and political identity reasons or for vote dilution or remedial reasons.<sup>76</sup> The Court struck down Georgia's redistricting plan and concluded that the nation's goals of "getting beyond race" are not advanced by "carving electorates into racial blocs."<sup>77</sup>

The Court's approach in *Miller* (duplicated in *Shaw v. Hunt (Shaw II)*)<sup>78</sup> reflects a top-down understanding of racial identity claims.<sup>79</sup> For the Court, identity is not an endogenous social characteristic that rises from the bottom up, but instead is imposed externally from the top by political elites in furtherance of their own ends.<sup>80</sup> As Professors Karlan and Levinson have noted, the Court's traditional equal protection doctrine frames its understanding of racial identity.<sup>81</sup> There, the majority and political elites use race

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that it was part of its litigation strategy. *Id.* at 131; *see also id.* at 130 ("The State was involved in other voting rights litigation and did not want to make admissions in *Miller* that might damage its position in the other cases.").

74. *Id.* at 158.

75. *Id.* at 157.

76. *Miller*, 515 U.S. at 921, 924-27.

77. *Id.* at 927. *Miller* is not the only case in which the DOJ came under attack from the Supreme Court. The Court similarly excoriated the DOJ's preclearance posture in *Shaw v. Hunt*, 517 U.S. 899, 913 (1996) (*Shaw II*) ("It appears that the Justice Department was pursuing in North Carolina the same policy of maximizing the number of majority-black districts that it pursued in Georgia."). For an explanation of how the Court's reaction to overreaching by the DOJ affects the Court's interpretation of Section 5, see Ellen D. Katz, *Federalism, Preclearance, and the Rehnquist Court*, 46 VILL. L. REV. 1179 (2001).

78. *See Shaw II*, 517 U.S. at 913.

79. Of course, the Court's conception of "the state" also affects its reactions to racial identity claims. Although the Court in the racial districting cases does not come to terms with how its conception of "the state" affects its analysis of political rights claims, it has done so on at least one other occasion. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (discussing the state as a self-interested political party seeking to preserve majority power). For a discussion of how conceptions of state action should affect regulation of politics, see Issacharoff & Pildes, *supra* note 8, at 653-68, and Daniel Hays Lowenstein, *Associational Rights of Major Political Parties: A Skeptical Inquiry*, 71 TEX. L. REV. 1741, 1754-56 (1993).

80. *See Karlan & Levinson, supra* note 11, at 1218.

81. *Id.* at 1217.

as a basis for discriminatory treatment, a badge of inferiority.<sup>82</sup> Viewed in this light, one can also understand the inflammatory language the Court first employed in *Shaw I*,<sup>83</sup> and for which it has been roundly criticized.<sup>84</sup> In *Shaw I*, the Court compared North Carolina's District 12 to political apartheid<sup>85</sup>; argued that the purpose of the district was to segregate African Americans from white voters<sup>86</sup>; and predicted that unchecked, race-based districting may "balkanize us into competing racial factions."<sup>87</sup>

This hyperbolic language, in particular the political apartheid label,<sup>88</sup> underscores the Court's top-down vision of racial identity. The Court suspects that political actors, whether the state or political elites, sometimes manufacture a relationship between racial and political identity. In the Court's view, racial identity does not have political significance until state actors—to borrow from Aleinikoff and Issacharoff's illustration—roam around the state in an attempt to classify voters according to their race.<sup>89</sup> From the Court's perspective, state actors dictate on the basis of skin color who should vote where and for whom.<sup>90</sup> In part, the Court's reaction to race-based identity claims can be understood as a rejection of the role political elites are perceived to play in constructing and deploying racial identity.

#### D. Judicial Intervention as Remedy

Given the Court's concerns about the relationships between racial and political identity, its efforts to police the boundary between the two are not surprising.<sup>91</sup> The Court supports its decision to regulate the line between

82. *Id.*

83. See *supra* notes 24-30 and accompanying text.

84. Aleinikoff & Issacharoff, *supra* note 39, at 611-12; Higginbotham et al., *supra* note 11, at 1620-25 (criticizing the "political apartheid" analogy); J. MORGAN KOUSSER, COLORBLIND INJUSTICE: MINORITY VOTING RIGHTS AND THE UNDOING OF THE SECOND RECONSTRUCTION 377-96 (1999); Frank R. Parker, *Factual Errors and Chilling Consequences: A Critique of Shaw v. Reno and Miller v. Johnson*, 26 CUMB. L. REV. 527 (1995-1996); Frank R. Parker, *The Constitutionality of Racial Redistricting: A Critique of Shaw v. Reno*, 3 D.C. L. REV. 1 (1995).

85. *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*).

86. *Id.* at 642, 651.

87. *Id.* at 657; see also *Holder v. Hall*, 512 U.S. 874, 892 (1994) (Thomas, J., concurring).

88. See also *Holder*, 512 U.S. at 906 (Thomas, J., concurring) (comparing race-based districting to racial registers).

89. See Aleinikoff & Issacharoff, *supra* note 39, at 615.

90. *Id.* at 629 ("Under any discretionary districting system, state authorities arrogate to themselves the ability and authority to determine how representation will be allocated, and which individuals or groups will be frustrated participants in the electoral marketplace.").

91. As Professor Karlan observed, the "Court sees itself as the only institution capable of resolving the difficult questions raised by the role of race in American democracy." Pamela S. Karlan, *Nothing Personal: The Evolution of the Newest Equal Protection from Shaw v. Reno to Bush v. Gore*, 79 N.C. L. REV. 1345, 1347 (2001). See also M. Elaine Hammond, *Toward a More Colorblind Society? Congressional Redistricting After Shaw v. Hunt and Bush v. Vera*, 75 N.C. L. REV. 2151 (1997); James U. Blacksher, Book Note, *American Political Identity and History*, 95 NW. U. L. REV. 715 (2001).

race and politics on two grounds. First, the Court maintains that it has the institutional responsibility to ensure that political actors comply with relevant constitutional provisions. In *Miller v. Johnson*, Justice Kennedy wrote that “the judiciary retains an independent obligation in adjudicating” racial gerrymandering claims to “enforc[e] the constitutional limits on race-based official action.”<sup>92</sup> Justice Kennedy explicitly relied upon *Marbury v. Madison*<sup>93</sup> and *Cooper v. Aaron*,<sup>94</sup> quoting *Marbury*’s famous apothegm that “[i]t is emphatically the province and duty of the judicial department to say what the law is” as justification for the majority’s assertions of authority in *Miller* and in the racial gerrymandering cases.<sup>95</sup>

Second, the Court assumes the responsibility, in its institutional “backstop role,”<sup>96</sup> for eradicating racial identity or reducing its effects on the political landscape. As Justice O’Connor stated in *City of Richmond v. J.A. Croson Company*, the “ultimate goal” is “eliminat[ing] entirely from governmental decisionmaking such irrelevant factors as a human being’s race . . . .”<sup>97</sup> Justice O’Connor returned to this theme in *Shaw I*, where she asserted that “race-based districting by our state legislatures demands close judicial scrutiny” because “it threatens to carry us further from the goal of a political system in which race no longer matters—a goal that the Fourteenth and Fifteenth Amendments embody, and to which the Nation continues to aspire.”<sup>98</sup> Justice Kennedy sang the same refrain in *Miller*:

As a Nation we share both the obligation and the aspiration of working [to eradicate] invidious discrimination from the electoral process and [to] enhanc[e] the legitimacy of our political institutions. Only if our political system and our society cleanse themselves of that discrimination will all members of the polity share an equal opportunity to gain public office regardless of race.<sup>99</sup>

In sum, the Court has adopted a position in the debate over the role law should play in the maintenance of racial identity. Although the Court has equivocated in some of its opinions, it has often sided with those who believe that racial identity is externally imposed by political elites and is unidirectionally pernicious in its effect on the body politic. The inevitable conclusion is that the Court should act to undermine the racial identity framework whenever possible by excising racial identity from democratic politics.

92. 515 U.S. 900, 922 (1995).

93. 5 U.S. 137 (1803).

94. 358 U.S. 1 (1958).

95. *Miller*, 515 U.S. at 922 (quoting *Marbury*, 5 U.S. at 177, and *Cooper*, 358 U.S. at 18).

96. *Bush v. Vera*, 517 U.S. 952, 985 (1996).

97. 488 U.S. 469, 495 (1989) (quoting *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 320 (1986) (Stevens, J., dissenting)).

98. *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (*Shaw I*).

99. 515 U.S. at 927.

In this Part I have argued that to make sense of the Court's reaction to the use of race in the design of electoral structures, one must come to terms with the four main underlying premises of the racial districting cases. First, the Court is skeptical of racial identity as a descriptive matter. Second, the Court believes that state action on the basis of racial identity is essentialist. Third, the Court objects to the role political elites play in constructing and defining identity. Finally, the Court believes that it has an important role to play in ridding the body politic of the pernicious effects of racial identity. In the remainder of the Article I evaluate the merits of these underlying premises.

## II

### UNDERSTANDING IDENTITY

Our initial inquiry is whether the Court is right to be skeptical of the purported relationship between race and democratic politics. In contrast to the Court's voting rights jurisprudence, social scientists understand group identity as ubiquitous and necessary to social and political life. They take as a given that groups, racial and otherwise, exist and are endemic to human life.<sup>100</sup> Such understandings undermine the Court's descriptive claims about group identity from the outset.<sup>101</sup>

Moreover, the social psychology literature paints a picture of the individual different from the one the Court depicts in its race jurisprudence. From the Court's perspective, the individual is the sole bearer of constitutional rights; thus, constitutional law is (and ought to be) blind to the individual's social identities. From this vantage point, courts adjudicate constitutional rights without concern for social groupings. In contrast, social psychologists view the individual as the product of her group identities. The combination of groups to which she belongs strongly influences who the individual is, what she believes, and how she behaves.

Demonstrating a functional relationship between political and racial identity, and addressing the constitutional implications of such a relationship, necessarily assumes the existence of something called group identity. In this Part I make the social scientific case for the existence and function of groups in social life. First, I review some important concepts from social

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100. JOHN C. TURNER ET AL., REDISCOVERING THE SOCIAL GROUP: A SELF-CATEGORIZATION THEORY 126 (1987) (noting the "social and psychological reality of groups and group behavior—social groups do exist, individuals do identify with social groups, i.e., perceive themselves as group members, and they do behave as group members rather than as individuals under certain conditions").

101. Some legal scholars share the perspective of social psychologists on the question of identity. See, e.g., Alex M. Johnson Jr., *The New Voice of Color*, 100 YALE L.J. 2007 (1991). Dean Johnson understands identity from a communitarian perspective. He noted that "implicit in the communitarian philosophy is an emphasis on the contextual—the individual is not viewed atomistically as the sum of parts separate from others. Instead, the individual is viewed as part of the community, simultaneously shaping the community to which he belongs and being shaped by it." *Id.* at 2056.

psychology demonstrating that group identity is an intrinsic part of self-definition. Then I use empirical studies that examine the political behavior and public opinion of African Americans to show how group identity can influence political thought and political behavior.

### A. *Lessons from Social Psychology*

What is the relationship between individual and group identity?<sup>102</sup> How does an individual cease to identify solely as an individual and begin to identify with a particular social group? As an initial point of departure, social psychology does not recognize the clear distinction reflected in the Court's equal protection jurisprudence between the individual and the group. The social psychological literature on the individual and the group reveals a symbiotic relationship between the two.<sup>103</sup> Specifically, social psychologists have concluded that the process by which individuals form their self-identities is the same process by which they form their group identities. Individuals arrive at their self-definitions through a cognitive process of characterizing stimuli, which includes self-categorization as well as other-categorization.

The process of categorization is central to the relationship between self-identity and group identity because it is by categorizing that we make sense of who we are and the world around us.<sup>104</sup> Categorization is a natural

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102. The question of how individuals come to identify with a social group is the central focus of two related areas of study in social psychology: self-categorization theory and social identity theory. TURNER ET AL., *supra* note 100, at 42; see also Michael A. Hogg et al., *A Tale of Two Theories: A Critical Comparison of Identity Theory with Social Identity Theory*, 58 SOC. PSYCH. Q. 255, 259-62 (1995). Generally, self-categorization theory explains how individuals come to define themselves in terms of a social group. Social identity theory explains how social groups interact with one another and their effect upon individuals. TURNER ET AL., *supra* note 100, at 42.

103. Abrams and Hogg noted that

Social identity theory conceives of the self-concept as a collection of self-images which vary in terms of the length of their establishment, complexity and richness of content, etc. However, the important emphasis is that these self-images can be construed as falling along a continuum, with individuating characteristics at the personal extreme and social categorical characteristics at the social extreme. . . . When social identity is salient one acts *as a group member*, whereas, when personal identity is salient, one does not.

DOMINIC ABRAMS & MICHAEL A. HOGG, *SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES* 3-4 (1990). Turner and his colleagues usefully stated:

Social identity is, therefore, a 'socially structured field' within the individual mind, an important element of the psychological or subjective processes of society. It is a mechanism whereby society forms the psychology of its members to pursue its goals and conflicts as for example 'citizens', 'Americans', 'Irish republicans', 'conservatives', 'socialists', or 'Catholics'. Its functioning provides group members with a shared psychological field, shared cognitive representations of themselves, their own identity, and the objective world in the form of shared social norms of fact and value and hence makes meaningful the simplest communications and emotions of a public, intersubjective life.

TURNER ET AL., *supra* note 100, at 207.

104. GORDON W. ALLPORT, *THE NATURE OF PREJUDICE* 20 (1954). Allport maintained that [O]ur experience in life tends to form itself into clusters (concepts, categories), and while we may call on the right cluster at the wrong time, or the wrong cluster at the right time, still the

and arguably inevitable phenomenon of human existence.<sup>105</sup> Human beings, by necessity, categorize objects and people in their world.<sup>106</sup> Moreover, just as people categorize cars and food, using the former for transportation and the latter for sustenance, so too do they categorize people.<sup>107</sup> Similarly, the "tendency to view others and oneself in terms of readily apparent group categories helps individuals to establish a sense of both personal and social identity by providing a basis for comparing themselves to the rest of society."<sup>108</sup> The process of categorizing stimuli, which social psychologists define as physical or social objects including the self, "serves the function of rendering the world subjectively meaningful and identifies those aspects relevant to action in the particular context."<sup>109</sup>

Within this hierarchical system of classification, social psychologists have generally identified three levels of self-categorization. At the highest level of abstraction, in what Turner and his colleagues referred to as the superordinate level of the self, we classify ourselves as members of the human race.<sup>110</sup> At the intermediate level of abstraction, we classify others and ourselves into in-groups and out-groups.<sup>111</sup> It is at this level that we form and establish our social or group identities.<sup>112</sup> Finally, at the lowest level of abstraction, what Turner and his colleagues referred to as the subordinate level of the self, and what I will refer to as individual or personal identity, we characterize ourselves as unique individuals.<sup>113</sup> At this level, we focus on the characteristics that set us apart from all others.<sup>114</sup>

In contrast to the Supreme Court's equal protection jurisprudence, which accords individual identity primacy over social identity, social psychologists have found that the social group is "ontogenetically primary" to

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process in question dominates our entire mental life. A million events befall us every day. We cannot handle so many events. If we think of them at all, we type them.

*Id.*

105. *Id.*

106. *Id.* at 20-21.

107. *Id.* at 20.

108. Conover, *supra* note 1, at 58-59.

109. Michael A. Hogg & Craig McGarty, *Self-Categorization and Social Identity*, in *SOCIAL IDENTITY THEORY: CONSTRUCTIVE AND CRITICAL ADVANCES* 12 (Dominic Abrams & Michael Hogg eds., 1990).

110. TURNER ET AL., *supra* note 100, at 45.

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.* at 46. It is worth noting here another distinction between how the understanding of individual identity varies between social psychology and the Supreme Court's doctrine. The Court privileges individual identity over social identity. For the Court, personal identity is the individual's true identity and the one protected by the Constitution.

the individual's definition of himself or herself.<sup>115</sup> Our group identities help shape who we are, what we believe, and how we behave.<sup>116</sup>

The individual arrives in a world in which there are already established categories.<sup>117</sup> He is born into many of these categories, and even before he realizes it these categories begin to define him.<sup>118</sup> As part of the individual's attempt to define himself and to make sense of his world,<sup>119</sup> he processes his experiences by categorizing them in a manner consistent with his group identities.<sup>120</sup> In the course of categorizing his experiences, he also defines himself and gives content to his personal and social identities.<sup>121</sup> Of course, the individual is not limited to the social identities into which he was born. His social identities change, intensify, or diminish as he categorizes his experiences and responds to stimuli in his world.<sup>122</sup> This is the process of self-categorization.<sup>123</sup> By this process the "social world is cognitively mapped in terms of prototypes of categories to which we belong and those to which we do not belong."<sup>124</sup>

### B. *African Americans and Political Identity*

That our group identities are determined prior to our individual identities in social psychological development and that our unique combinations of group identities define us provide a basis for questioning the Court's viewpoint but not for rejecting it completely. The Court is certainly right to object when state actors simply assume that because an individual is a person of color the individual will subscribe to certain political views and share the same political interests as other people of color. This assumption is indeed a demeaning stereotype of the worst kind.

However, how should the Court respond if state actors take race into account because citizens of color have chosen to use their group identities as a basis for political affiliation? As I explain in this section, the evidence

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115. Michael A. Hogg, *Social Identity and the Sovereignty of the Group: A Psychology of Belonging*, in *INDIVIDUAL SELF, RELATIONAL SELF, COLLECTIVE SELF* 123, 130 (C. Sedikides & Marilynn B. Brewer eds., 2001); see also *id.* at 131.

116. Social psychology casts great doubt onto the neat distinctions drawn by constitutional and liberal political theory between the individual and the group. *Id.* at 124 (stating that "groups have a profound impact on us. They influence the attitudes we hold, and the way we perceive, feel, and act"); see also *id.* at 131-39; Hogg et al., *supra* note 102, at 259.

117. See ALLPORT, *supra* note 104, at 31. Individuals conceptualize social groups as "prototypes: fuzzy sets of attributes that prescribe thoughts, feelings, and behaviors that capture commonalities among people within a group and distinguish that group from other groups." Hogg, *supra* note 115, at 131.

118. ALLPORT, *supra* note 104, at 30.

119. Hogg, *supra* note 115, at 134.

120. *Id.* at 132-33.

121. Hogg et al., *supra* note 102, at 259.

122. TURNER ET AL., *supra* note 100, at 46-47.

123. Hogg et al., *supra* note 102, at 260.

124. Hogg, *supra* note 115, at 131.

is overwhelming that group identifications significantly influence an individual's opinion and behavior. Perhaps more important, the influence of social groups is not limited to social thought and behavior but extends to political thought and behavior as well. Once a person has adopted (or inherited) a particular group identity, she begins to interpret the world from the perspective of this social group and to adopt its beliefs and behaviors.<sup>125</sup> Social psychologists refer to this process as "depersonalization."<sup>126</sup> Through this process, the individual identifies with the social groups to which she feels she belongs.<sup>127</sup> The process also facilitates group behavior and encourages individuals who share the same group identities to "think alike."<sup>128</sup>

Moreover, the fact that members of the same group are likely to find themselves occupying the same socioeconomic space facilitates group behavior and distinctive viewpoints by group members.<sup>129</sup> Individuals who occupy a similar socioeconomic space are more likely to belong to the same social groups.<sup>130</sup> They are also more likely to categorize themselves and their experiences similarly.<sup>131</sup> Consequently, they are more likely to think and to behave in the same way.<sup>132</sup> When individuals think and behave in the same way, they tend to vote in the same way. To further illustrate how social groups affect political alignment and behavior, in the next section I present empirical data comparing the partisan affiliation and public opinion of African Americans and white Americans. I then discuss the origin of these racial differences.

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125. *Id.*

126. TURNER ET AL., *supra* note 100, at 50-51. It is worth noting that depersonalization is not a negative psychological experience. As Turner and his colleagues made clear, "[i]n many respects depersonalization may be seen as a *gain* in identity, since it represents a mechanism whereby individuals may act in terms of the social similarities and differences produced by the historical development of human society and culture." *Id.* at 51.

127. Hogg et al., *supra* note 102, at 261.

128. The process is succinctly summarized by Michael Hogg and Craig McGarty:

First, people categorize and define themselves as members of a distinct social category or assign themselves a social identity; second, they form or learn the stereotypic norms of that category; and third, they assign these norms to themselves and thus their behavior becomes more normative as their category membership becomes salient.

Michael A. Hogg & Craig McGarty, *Self-Categorization Theory and Social Identity*, in SOCIAL IDENTITY THEORY: CONSTRUCTIVE & CRITICAL ADVANCES 15 (Dominic Abrams & Michael A. Hogg eds., 1990).

129. Hogg et al., *supra* note 102, at 261. See also Michael Hughes & Steven A. Tuch, *How Beliefs About Poverty Influence Racial Policy Attitudes: A Study of Whites, African Americans, Hispanics and Asians in the United States*, in RACIALIZED POLITICS 189-90 (David O. Sears et al. eds., 2001).

130. See sources cited *supra* note 129.

131. TURNER ET AL., *supra* note 100, at 71-72.

132. *Id.*



### 1. *African Americans' Partisan Affiliation*

Our inquiry here is whether there is an empirical relationship between racial and political identity. One simple method of determining the existence of this relationship is to examine party identification for African Americans. In this section I do so through use of the 2000 National Election Studies (NES) and the 1996 National Black Election Study (NBES).<sup>133</sup>

Table 1 shows the party identification of all respondents in the 1996 NBES who reported a party identification. As the table demonstrates, party identification varies little among African Americans. Out of more than eleven hundred respondents, forty-seven, or slightly over 4%, identified as Republicans. In contrast, 74% of respondents identified as Democrats.

TABLE 1  
PARTY IDENTIFICATION: AFRICAN AMERICANS

Party	Frequency	Percentage
Republican	47	4.19
Independent	239	21.32
Democrat	835	74.49
Total	1,121	

The absence of variation in the party identification of African Americans stands in sharp contrast to the political affiliations of white Americans. Using data from the 2000 NES, Table 2 shows that party identification is more evenly distributed among whites than among African Americans. Of the white respondents, 44% identified as Democrats, 44% identified as Republicans, and 11% identified as independents.

133. The NES is a series of nationwide surveys designed to show the opinion of the electorate on a wide variety of public policy issues. The Center for Political Studies of the Institute for Social Research conducted the 2000 NES. The principal investigators were Nancy Burns, Donald R. Kinder, Steven J. Rosenstone, Virginia Sapiro, and the National Election Studies. The dataset and codebook are both available online at <http://www.umich.edu/~nes/studyres/nas2000/> (last visited Aug. 11, 2002). The entire archive is available at <http://www.umich.edu/~nes> (last visited Aug. 11, 2002). The NBES is modeled after the NES, with the exception that the respondents are all African Americans. The NBES is designed to provide information on the attitudes and political preferences of the black electorate. The principal investigator for the 1996 NBES was Katherine Tate. For more information on the NBES, including a copy of the dataset and codebook, see <http://www.democ.uci.edu/democ/archive.htm> (last visited Aug. 7, 2002).

TABLE 2  
PARTY IDENTIFICATION: WHITE AMERICANS

Party	Frequency	Percentage
Republican	604	44.09
Independent	161	11.75
Democrat	605	44.16
Total	1,370	

Because these are univariate statistics, the relationship found between African Americans and the Democratic Party may be spurious; the study may have failed to control for other independent variables. Table 3 presents the results of a multivariate logistic regression of party identification using data from the 2000 NES. The independent variables are education, income, gender, age, black racial identity, and Latino racial identity. As is evident from Table 3, both black and Latino respondents are more likely than whites to identify with the Democratic Party, even controlling for other important variables such as income and education.

TABLE 3  
PARTY IDENTIFICATION<sup>134</sup>

Independent Variables	Coefficient	SE	Z	P
Education	-.110	.037	-2.96	.003
Income	-.065	.019	-3.28	.001
Gender	.194	.114	1.69	.090
Age	.000	.003	.13	.894
Black	2.149	.295	7.27	.000
Latino	.614	.257	2.39	.017

These findings are consistent with those of previous researchers who have examined the relationship between race and party identification among African Americans.<sup>135</sup> For example, Professor Katherine Tate has

134. SE, standard error; Z, test statistic; P, probability that test statistic would take a value as extreme as or more extreme than that actually observed.

135. See, e.g., EDWARD G. CARMINES & JAMES A. STIMSON, RACE AND THE TRANSFORMATION OF AMERICAN POLITICS (1989); MICHAEL C. DAWSON, BEHIND THE MULE: RACE AND CLASS IN

noted that African Americans make up approximately 25% of the Democratic Party's membership and since 1964 have become one of the largest blocs in the party.<sup>136</sup> As Professor Terry Smith remarked, "Blacks are overwhelmingly Democratic."<sup>137</sup> Thus, there is an empirically verifiable relationship between race and political identity for African Americans.<sup>138</sup>

## 2. *African Americans' Public Opinion*

As may be expected, the racial effect on partisanship is not limited to partisan affiliation. There is also a racial divide on public opinion, specifically on public opinion regarding matters related to race.<sup>139</sup> Professor Michael C. Dawson has noted that, for most issues, especially those related to race and economics, African Americans are "the most politically liberal group" in the United States.<sup>140</sup> The wide gulf between the public opinion of African Americans and whites on racial and racially tinged issues has drawn the attention of leading researchers in this area:

No doubt the most striking feature of public opinion on race is how emphatically black and white Americans disagree with each other. On the obligation of government to ensure equal opportunity, on federal efforts to help blacks, and on affirmative action, a huge racial divide opens up. Blacks and whites also disagree sharply over policy questions that are racial only by implication, over how generous the American welfare state should be, and over the integrity of American political institutions. The racial divide in opinion widens when whites talk with whites and blacks talk with

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AFRICAN-AMERICAN POLITICS 55 (1994); GURIN ET AL., *supra* note 1, at 87; TATE, *supra* note 2, at 50-58.

136. TATE, *supra* note 2, at 50.

137. Terry Smith, *Reinventing Black Politics: Senate Districts, Minority Vote Dilution and the Preservation of the Second Reconstruction*, 25 HASTINGS CONST. L.Q. 277, 329 (1998).

138. African Americans do not have a blind adherence to the Democratic Party but identify with the party that they believe best represents black interests. In fact, in a recent paper, the political scientists Hajnal and Lee have concluded that "[n]o matter how African American partisan choices are modeled, there is a clear and strong direction to the effects of group attachments. Those who believe the American system is unfair and that their fate is linked to the larger black community are much more apt to support the Democratic party." Zoltan Hajnal & Taeku Lee, *The Multidimensionality of African American Party Identification* 22 (April 25, 2003) (paper, on file with the California Law Review); see also DAWSON, *supra* note 135, at 108 ("Historically, large-scale shifts in African-American support for political parties have been tied to perceptions of which party best advanced black interests."). Moreover, African Americans do not limit their attachments to the two major parties. They are open to third parties provided that those parties are concerned about black interests. For recent empirical arguments on the multidimensionality of the partisan identifications of African Americans, see MICHAEL C. DAWSON, *BLACK VISIONS: THE ROOTS OF CONTEMPORARY AFRICAN-AMERICAN POLITICAL IDEOLOGIES* 10-43 (2001), and Hajnal & Lee *supra*. The classic work in the field remains HANES WALTON JR., *BLACK POLITICAL PARTIES: AN HISTORICAL AND POLITICAL ANALYSIS* (1972). For a perceptive legal analysis, see Smith, *supra* note 10.

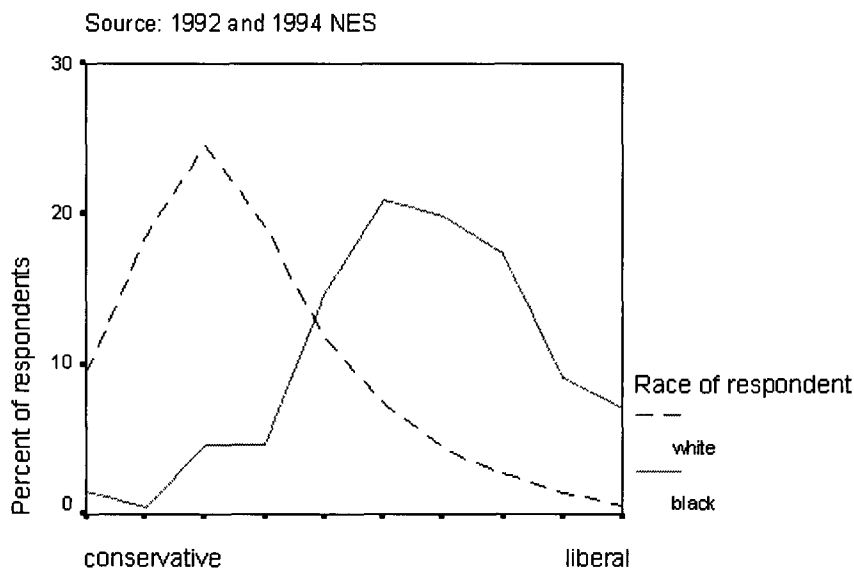
139. HANES WALTON JR. & ROBERT C. SMITH, *AMERICAN POLITICS AND THE AFRICAN AMERICAN QUEST FOR UNIVERSAL FREEDOM* 65 (2000) ("The race gap is a chasm.").

140. DAWSON, *supra* note 135, at 55.

blacks, itself a sign of the difference race makes to our social and political lives. It is as apparent among ordinary citizens as it is among elites. It is not a mask for class differences: it is rooted in race, in differences of history and circumstance that define the black and white experiences. And if differences by race are nothing new to American politics, they are, if anything, more dramatic now than a generation ago.<sup>141</sup>

Figure 1 depicts the gap in public opinion on racial issues between whites and African Americans; it shows their differences of opinion on twenty public policy questions involving race.<sup>142</sup> Researchers solicited opinions on affirmative action, on whether the position of African Americans in American society is due to racism or the failure of African Americans to work hard, and on the government's role in promoting integration.<sup>143</sup>

FIGURE 1  
PUBLIC OPINION ON RACIAL ISSUES



The difference in public opinion between whites and African Americans is not limited to racial issues. A similar gap exists for issues with a racial subtext—matters of public policy that individuals perceive to

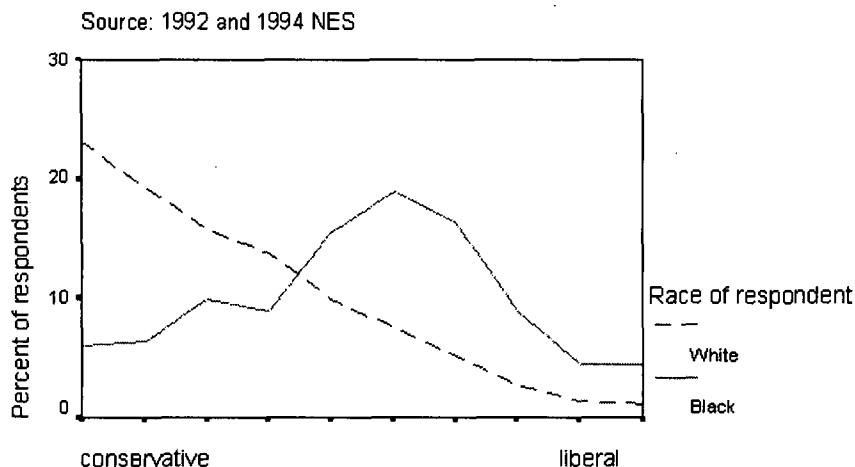
141. DONALD R. KINDER & LYNN M. SANDERS, *DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS* 33 (1996).

142. *Id.* at 28. I thank David Canon for permission to use Figures 1 and 2 from DAVID T. CANON, *RACE, REDISTRICTING & REPRESENTATION* 28-30 (1999).

143. KINDER & SANDERS, *supra* note 141, at 28.

disproportionately affect one race more than others, such as the death penalty, welfare programs, and food stamps.<sup>144</sup> As Figure 2 demonstrates, whites are extremely conservative on issues with a racial subtext. In contrast, the distribution for African Americans is close to normal. The distributions indicate more variation in the public opinion of African Americans than of whites on issues with a racial subtext. However, both groups lean—in the case of whites, very heavily—in expected directions. These findings clearly demonstrate that on racial and social welfare issues, African Americans are very to relatively liberal and whites are very conservative.<sup>145</sup>

FIGURE 2  
PUBLIC OPINION ON IMPLICITLY RACIAL ISSUES



### 3. Accounting for Racial Differences

Party identification and public opinion vary by race. Political scientists have concluded that racial identity is the best explanation for these differences.<sup>146</sup> For most African Americans, racial group interests serve as a useful barometer for evaluating public policy, political parties, and candidates.<sup>147</sup> As Professor Dawson has explained, “the historical experiences

144. See CANON, *supra* note 142, at 28-29.

145. See, e.g., DAWSON, *supra* note 135, at 182 (noting “deep and profound political divisions between blacks and whites”); KINDER & SANDERS, *supra* note 141, at 33 (presenting evidence of “a deep and perhaps widening racial divide”).

146. See, e.g., TATE, *supra* note 2, at 38-40; see also Johnson, *supra* note 23, at 1415 (“African-Americans belong to a unique ethnic group. Their ethnicity simultaneously constitutes who they are and separates them from whites who, although they belong to many different ethnic groups, do not and cannot belong to the ethnic group composed of African-Americans.”).

147. DAWSON, *supra* note 135, at 45-68. Professor Dawson referred to this belief system as “linked fate.” *Id.* at 77-84. Professors Gurin, Hatchett, and Jackson referred to it as group political

of African Americans have resulted in a situation in which group interests have served as a useful proxy for self-interest."<sup>148</sup> Convincing empirical evidence supports this proposition.<sup>149</sup>

In *Holder v. Hall*, Justice Thomas protested what he characterized as the Court's "pernicious" assumption that "race defines political interest."<sup>150</sup> He noted that the Court's vote dilution cases accepted a correlation between racial and political identity without inquiring "into the cause for the correlation (to determine, for example, whether it might be the product of similar socioeconomic interests, rather than some other factor related to race) . . . ."<sup>151</sup>

However, scholars who study race and politics have already searched for the causes of the correlation between race and political identity. Professor Gurin and her colleagues have concluded that, even controlling for class and many other relevant factors, racial identity is the best predictor of both African American partisan identification and African American public opinion on public policy questions with racial implications.<sup>152</sup> Professor Dawson reached a similar conclusion; in reporting the results of his study on the relationship of African Americans to the Democratic and Republican Parties, he noted:

It is evident that socioeconomic status is only weakly associated with African-American evaluations of the two parties. . . . Socioeconomic status had no relationship to long-term African-American party identification. . . .

Perceptions of African-American racial and economic group interests and their consequences, on the other hand, played an important role . . . in predicting both African-American party identification and perceptions of which party best advances black interests.<sup>153</sup>

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consciousness. See GURIN ET AL., *supra* note 1, at 75-80. See also Pamela Johnston Conover, *The Influence of Group Identifications on Political Perception and Evaluation*, 46 J. POL. 760 (1984) (describing the political impact of group identity). Although there are some methodological differences between "linked fate" and group political consciousness, they are conceptually the same. Their core contentions and findings are that most African Americans identify as African Americans and evaluate public policy based on its impact on African Americans as a group.

148. DAWSON, *supra* note 135, at 77. Justice Marshall recognized that African Americans have a shared historical experience: the "dream of America as the great melting pot has not been realized for the Negro; because of his skin color he never even made it into the pot." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 400-01 (1978) (Marshall, J., concurring in part, dissenting in part).

149. See generally DAWSON, *supra* note 135, *passim*; GURIN ET AL., *supra* note 1, *passim*; TATE, *supra* note 2, *passim*. For the manner in which these concepts are empirically modeled and measured, see DAWSON, *supra* note 135, at 71-95; GURIN ET AL., *supra* note 1, at 75-105; TATE, *supra* note 2, at 20-49; and Richard L. Allen et al., *A Schema-Based Approach to Modeling an African-American Racial Belief System*, 83 AM. POL. SCI. REV. 441 (1989).

150. 512 U.S. 874, 903 (1994) (Thomas, J., concurring).

151. *Id.* at 904.

152. GURIN ET AL., *supra* note 1, at 109.

153. DAWSON, *supra* note 135, at 115-16. See also TATE, *supra* note 2, at 40-42.

Professor Tate noted that African Americans who most strongly identified as African Americans reported the strongest affiliation with the Democratic Party.<sup>154</sup>

Perhaps the Court is correct to be skeptical of claims that racial identification completely defines the individual, and it is certainly right to insist on empirical proof that racial identity and political identity are correlated. But the Court is wrong, as an empirical matter, if it concludes that no relationship exists between racial and political identity. Whether the state should be permitted to act upon racial differences is a normative inquiry whose resolution is best facilitated via a discussion of the First Amendment right of association.

### III

#### THE RIGHT OF ASSOCIATION

##### *A. Political Association: Contours and Exposition*

In his classic survey of early American life, Alexis de Tocqueville remarked that the “most natural privilege of man, next to the right of acting for himself, is that of combining his exertions with those of his fellow-creatures, and of acting in common with them.”<sup>155</sup> This observation led Tocqueville to conclude that the “right of association is almost as inalienable as the right of personal liberty.”<sup>156</sup>

Many other political philosophers have also recognized the freedom of association as a basic component of any democratic polis.<sup>157</sup> John Stuart Mill argued that a necessary corollary of an individual’s essential liberty is the liberty of “combination among individuals” and the “freedom to unite, for any purpose not involving harm to others.”<sup>158</sup> Similarly, John Rawls included the freedom of association as a basic liberty of all individuals.<sup>159</sup> As Rawls explained, freedom of association is important to “secure the full and informed and effective application of citizens’ powers of deliberative

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154. TATE, *supra* note 2, at 63-64 (finding that racial identity was the only predictor of partisan affiliation and that “[s]trong racial identifiers are more likely to identify strongly with the Democratic party than weak racial identifiers”).

155. ALEXIS DE TOCQUEVILLE, *I DEMOCRACY IN AMERICA* 209 (Henry Reeve trans., Henry G. Langley 1845) (1835). Tocqueville was not an unconditional proponent of the right of political association. He stated that “if the liberty of association is a fruitful source of advantages and prosperity to some nations, it may be perverted or carried to excess by others, and the element of life may be changed into an element of destruction.” *Id.*

156. *Id.*

157. J.S. MILL, *ON LIBERTY* 15-16 (Stefan Collini ed., 1989); JOHN RAWLS, *POLITICAL LIBERALISM* 291, 309, 313, 332-41 (1993); Michael Walzer, *On Involuntary Association*, in *FREEDOM OF ASSOCIATION* 64 (Amy Gutmann ed., 1998) (“Freedom of association is a central value, a fundamental requirement of liberal society and democratic politics.”); IRIS MARION YOUNG, *INCLUSION AND DEMOCRACY* 18 (2000) (stating that the “democratic process requires freedoms of speech, assembly, and association”).

158. MILL, *supra* note 157, at 16.

159. RAWLS, *supra* note 157, at 191.

reason to their forming, revising, and rationally pursuing a conception of the good over a complete life."<sup>160</sup> Unequivocally, the freedom of association is an indispensable prerequisite of democratic societies.<sup>161</sup>

The right of association takes two forms. Association is both an intrinsic good and instrumental to the pursuit of other ends. As an intrinsic good, freedom of association is "integral to a free human life, to being a free person."<sup>162</sup> The freedom of association is "essential for providing the opportunity to individuals to live a good life and for constituting a just society."<sup>163</sup> On some accounts, the ability to associate with others is the primary determinant of the good life.<sup>164</sup>

In addition to its intrinsic value, the freedom of association is necessary to the protection of other liberties. It enables the individual to pursue lawful ends however he or she may define those ends. The ability to associate with others is also what enables citizens to participate in a democracy.<sup>165</sup> In addition, the ability of individuals to associate with others for whatever reason or no reason at all is self-definitional; individuals characterize and identify themselves by the types of associations they form and by the people with whom they associate.<sup>166</sup>

Although freedom of association is a fundamental component of democratic institutions, the Constitution references it obliquely at best.<sup>167</sup>

160. *Id.* at 335.

161. George Kateb, *The Value of Association*, in FREEDOM OF ASSOCIATION 36 (Amy Gutmann ed., 1998) ("In a constitutional democracy, people should have the right, recognized by government, to associate . . . for any appropriate purpose that does not harm the vital claims of others."); David Cole, *Hanging with the Wrong Crowd: Of Gangs, Terrorists, and the Right of Association*, 1999 SUP. CT. REV. 203, 203-04 ("As a matter of democratic theory, the right of association is something we cannot live without . . .").

162. Kateb, *supra* note 161, at 36.

163. Amy Gutmann, *The Freedom of Association: An Introductory Essay*, in FREEDOM OF ASSOCIATION 3, 7 (Amy Gutmann ed., 1998).

164. Consider the following portrait of civic life painted by Michael Walzer:

[T]he good life can only be lived in civil society, the realm of fragmentation and struggle but also of concrete and authentic solidarities, where we fulfill E.M. Forster's injunction 'only connect', and become sociable or communal men and women. And this is, of course, much the best thing to be. The picture here is of people freely associating and communicating with one another, forming and reforming groups of all sorts, not for the sake of any particular formation—family, tribe, nation, religion, commune, brotherhood or sisterhood, interest group or ideological movement—but for the sake of sociability itself. For we are by nature social, before we are political or economic beings.

Michael Walzer, *The Civil Society Argument*, in DIMENSIONS OF RADICAL DEMOCRACY: PLURALISM, CITIZENSHIP, COMMUNITY 97 (Chantal Mouffe ed., 1992). *See also* ROBERT PUTNAM, MAKING DEMOCRACY WORK 113 (1997) ("Happiness is living in a civic community."); YOUNG, *supra* note 157, at 189.

165. For an empirical analysis of the factors affecting participation, see SIDNEY VERBA ET AL., VOICE AND EQUALITY: CIVIC VOLUNTARISM IN AMERICAN POLITICS (1995).

166. For a powerful observation on the role of the right of association in protecting and defining gay identity, see Carpenter, *supra* note 10, at 1525-32.

167. *But cf.* Cole, *supra* note 161, at 226 (arguing that "while the right of association is not literally mentioned in the Constitution, it nonetheless finds solid textual support in the First Amendment as the modern-day manifestation of the right of assembly").



Nonetheless, Professor Daniel A. Farber has noted that it is “obvious that the First Amendment must protect not merely the individual speaker but also organized activities, ranging from political parties and media organizations to protest committees and dissident groups.”<sup>168</sup> The Court similarly has anchored protection for the right of association in both the First and Fourteenth Amendments.<sup>169</sup> In *NAACP v. Alabama ex rel. Patterson*, the Court stated that “[i]t is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”<sup>170</sup> The Court has declared that the right of an individual to engage in activities protected by the First Amendment—specifically speech, assembly, petition for redress of grievances, and exercise of religion—necessitates the recognition of a complementary right to associate with others in the pursuit of various political, economic, and religious goals.<sup>171</sup>

*Roberts v. United States Jaycees* illustrates the Court’s current approach to association.<sup>172</sup> In *Roberts*, the Court delineated two different types of association protected by the First Amendment. The first type of association, which the Court referred to as “intimate association,”<sup>173</sup> is the intrinsic feature of constitutionally protected association.<sup>174</sup> It protects one’s “choices to enter into and maintain certain intimate human relationships” that are “secured against undue intrusion by the State because of the role of such relationships in safeguarding the individual freedom that is central to our constitutional scheme.”<sup>175</sup> The Court’s concern here is the protection of familial relationships—marriage, procreation,

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168. DANIEL A. FARBER, *THE FIRST AMENDMENT* 225 (1998). See also Cole, *supra* note 161, at 203 (“[I]t is impossible to imagine a democratic society—much less the First Amendment rights of speech, assembly, religion, and petition—without a corresponding right of association, so it is not surprising that the absence of any explicit mention of association in the Constitution has proven little barrier to recognition of the right.”).

169. See, e.g., *Buckley v. Valeo*, 424 U.S. 1, 15 (1975).

170. 357 U.S. 449, 460 (1958).

171. *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“[W]e have long understood as implicit in the right to engage in activities protected by the First Amendment a corresponding right to associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends.”). See also *Kusper v. Pontikes*, 414 U.S. 51, 57 (1973) (stating that the right of political association is a “basic constitutional freedom”); *Healy v. James*, 408 U.S. 169, 181 (1972) (“Among the rights protected by the First Amendment is the right of individuals to associate to further their personal beliefs.”). Professor McGowan traced the development of the modern doctrine to *United States v. Cruikshank*, 92 U.S. 542 (1875). David McGowan, *Making Sense of Dale*, 18 CONST. COMMENT. 121, 126-30 (2001) (providing a history of the development of the right of association). See also Cole, *supra* note 161, at 228.

172. 468 U.S. 609.

173. *Id.* at 618.

174. *Id.*

175. *Id.* at 617-18.

raising and educating one's children, and cohabitation.<sup>176</sup> These types of relationships are to be free from state regulation because they are where "individuals draw much of their emotional enrichment" and where individuals "define [their] identity"—a process the Court finds "central to any concept of liberty."<sup>177</sup>

The second type of association, termed "instrumental," or "expressive,"<sup>178</sup> recognizes the "right to associate for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion."<sup>179</sup> We safeguard the freedom of association to engage in activities protected by the First Amendment and the Constitution because it is "an indispensable means of preserving other individual liberties."<sup>180</sup> Although this right to associate is not absolute, "state action which may have the effect of curtailing the freedom to associate is subject to the closest scrutiny."<sup>181</sup>

The Court has also recognized a number of different types of association under the umbrella of instrumental or expressive association. Freedom of expressive association protects the ability of a group to advocate both public and private viewpoints.<sup>182</sup> As the Court has noted, individuals "associate with others in pursuit of a wide variety of political, social, economic, educational, religious, and cultural ends."<sup>183</sup> Moreover, the state cannot discriminate among the various types of associations the individual enjoys. The Court stated in *NAACP v. Alabama ex rel. Patterson* that "it is immaterial whether the beliefs sought to be advanced by association pertain to political, economic, religious or cultural matters . . . ."<sup>184</sup> Protecting the various forms of associations is "important in preserving political and cultural diversity."<sup>185</sup> As Justice Rehnquist put it in *Boy Scouts of America v. Dale*, protecting the right of association "is crucial in preventing the majority from imposing its views on groups that would rather express other, perhaps unpopular, ideas."<sup>186</sup>

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176. *Id.* at 619.

177. *Id.*

178. *Id.* at 618.

179. *Id.*

180. *Id.*

181. *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 460-61 (1958). *See also* *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1982) (describing the analytical process a court must use to evaluate First and Fourteenth Amendment challenges to state election laws).

182. *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000); *Buckley v. Valeo*, 424 U.S. 1, 15 (1976).

183. *Roberts*, 468 U.S. at 622. *But see* *Dallas v. Stanglin*, 490 U.S. 19 (1989) (holding that city ordinance limiting use of dance halls to 14- through 18-year-olds does not violate right of association).

184. 357 U.S. at 460.

185. *Roberts*, 468 U.S. at 622.

186. 530 U.S. at 647-48.

Despite the importance of the right of political association, it has played no role in the development of the Court's race-based voting rights jurisprudence. The Court has relied exclusively on equality-based principles of individual rights and harm and has ignored relevant liberty-based principles of individual rights and harm. Perhaps more significant, the principles ignored are countervailing; that is, they might orient the Court's race and representation jurisprudence in a different direction than that suggested by equality-based notions of rights and harm. Although both courts and commentators have largely ignored these principles, the Court should take them into account as it develops its racial districting jurisprudence.

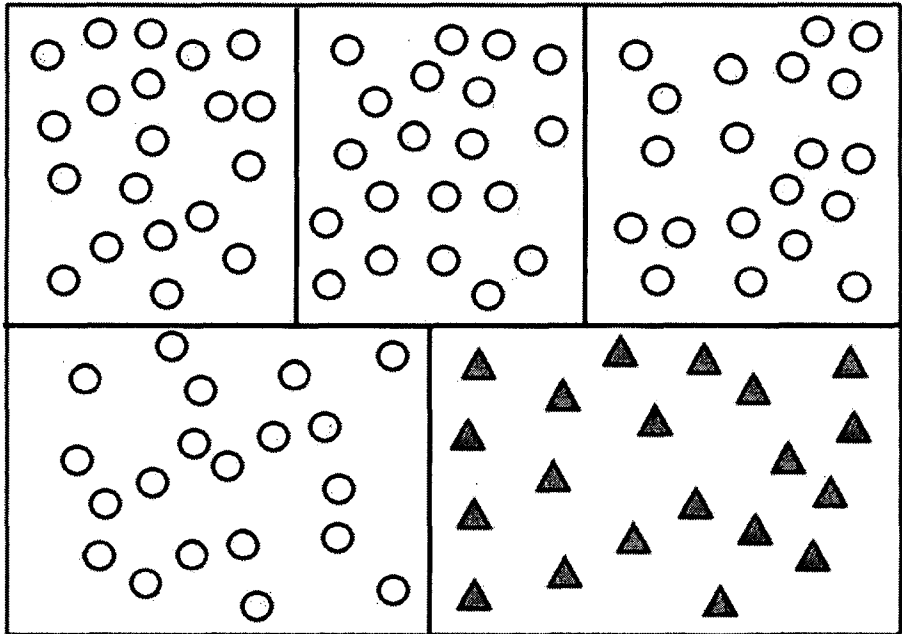
In this Part, I analyze the Court's political association cases and conclude that these cases are relevant to the Court's race and representation jurisprudence. Part III.B provides a hypothetical to show how the right of association applies to electoral structures. Part III.C argues that the Court's political association cases are applicable to electoral structures and explores how the design of electoral structures might unconstitutionally burden associational rights. This Part concludes that the Court should take the right of association into account in analyzing the constitutionality of race consciousness in the design of electoral structures.

### *B. Setting Up the Problem: The Hypothetical State of Bliss*

Suppose a state, which we will call Bliss, recently admitted to the Union as the fifty-first state, had one hundred residents prior to the 2000 census, 80% of whom were white. The state has a bicameral legislature, which consists of an upper chamber, the Senate, and a lower chamber, the House. Five House members are elected via five single-member districts. Of the five districts, one district is a majority-minority district—a district in which the majority of voters are citizens of color. There are also five Senators, who are similarly elected. Bliss has two political parties: the Center-Left Party (LP) and the Center-Right Party (RP).

Seventeen of the state's twenty voters of color are members of the LP. Half of Bliss's residents are registered members of the RP. Figure 3 depicts the districting scheme in effect during the 1990s, which shows that Blissians of color were geographically concentrated in the southeast corner of the state.

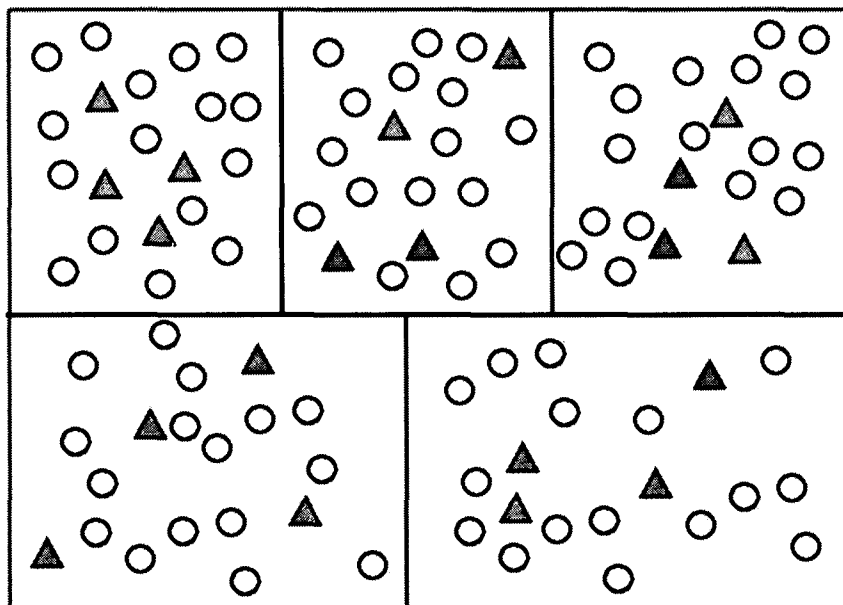
FIGURE 3



The 2000 census reveals that Blissians of color are now fairly dispersed throughout the state. After examining the voting behavior of the state's citizens and analyzing the results of a number of public opinion polls, social scientists have concluded that Blissians of color are distinctly more liberal than white Blissians on racial and social welfare issues, particularly those with racial implications. In addition, white Blissians, regardless of their party identification, are measurably more conservative on racial and social welfare issues than are Blissians of color; party identification cannot accurately predict the opinions of white Blissians on race and social welfare issues.

The Bliss legislature is currently debating two different redistricting plans: the Race-Blind Plan and the Race-Conscious Plan. The Race-Blind Plan adopts race-blind districting as a traditional districting principle. It prohibits the use of any data that include racial demographic information for the purpose of redistricting. The legislature would continue to use single-member districts as the electoral structure. Considerations of constitutional equality rather than animus against Blissians of color motivate the Race-Blind Plan. Figure 4 depicts the Race-Blind Plan.

FIGURE 4



In contrast to the Race-Blind Plan, the Race-Conscious Plan would mandate race consciousness in redistricting where the legislature has evidence that racial identity correlates significantly with political identity. To maximize the voting strength of Blissians of color, the Race-Conscious Plan would replace single-member electoral districts with a cumulative voting system.<sup>187</sup> Considerations of political association motivate the Race-Conscious Plan. Everyone agrees that if the legislature adopts the Race-Blind Plan, Blissians of color will not be able to elect a representative of their choice. The parties also agree that if the legislature adopts the

187. In a cumulative voting system, voters cast the same number of votes as there are seats. Because Bliss has five seats, the Race-Conscious Plan would permit all voters to cast five votes. Voters can also combine the votes in any way they want. Thus, they can cast five votes for one candidate or cast their votes in combination for multiple candidates. See ISSACHAROFF ET AL., *supra* note 3, at 1099-1102; Edward Still, *Alternatives to Single-Member Districts*, in MINORITY VOTE DILUTION 249, 255-58 (Chandler Davidson ed., 1984). Cumulative systems guarantee some measure of representation to cohesive political minorities, provided they cast all of their votes for one candidate and they surpass the threshold of exclusion—the minimum size a political minority must be to control at least one seat. “The formula for the threshold of exclusion under cumulative voting is  $1/(1+N)+1$ , where  $N$  is the number of seats to be filled. Thus, with five seats at stake and five votes to cast, a minority that casts one vote more than  $1/(1+5)$ , or one vote more than one-sixth of the total vote can control the outcome of one seat.” ISSACHAROFF ET AL., *supra* note 3, at 1102. See also Still, *supra*, at 256.

Race-Conscious Plan, Blissians of color may be able to elect at least one representative of their choice, provided they are politically cohesive.

This hypothetical provokes two distinct questions. First, can Bliss adopt the Race-Blind Plan without violating the associational rights of Blissians of color? Second, if the legislature adopts the Race-Conscious Plan, does the First Amendment provide it with a constitutional defense of its choice of a race-conscious redistricting plan over a race-blind alternative?

### C. *Political Association and Electoral Structures*

The first question that must be addressed is whether the Supreme Court's freedom of association cases are applicable to electoral structures. A skeptic might argue that as long as Blissians of color may meet, freely discuss politics, use their resources to persuade others, and get a candidate on the ballot with reasonable effort, the requirements of the First Amendment are satisfied. This skeptic might also argue that the Court's freedom of association cases are uniquely concerned with expressive private associations, and, because electoral structures are not "expressive," they are not entitled to First Amendment protection.

#### I. *The Right of Association Protects an Individual's Ability to Aggregate Political Power*

Although the Court has not precisely defined the contours of its expressive association doctrine,<sup>188</sup> its analysis has focused on the instrumental or functional nature of the expressive claim: the extent to which putative expressive activity facilitates the individual's ability to engage in activities protected by the First Amendment.<sup>189</sup> The Court has explored the impact state action is likely to have on citizens' right of political association in relation to the role that political association plays in safeguarding political rights in a representative democracy.<sup>190</sup>

Consider *NAACP v. Alabama ex rel. Patterson*.<sup>191</sup> In that case, the state of Alabama attempted to quash the National Association for the Advancement of Colored People's (NAACP's) civil rights activities in the state by filing suit against the organization on the grounds that the NAACP was doing business within the state without proper registration.<sup>192</sup> The state sought production of several documents, including the names and

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188. Daniel A. Farber, *Speaking in the First Person Plural: Expressive Associations and the First Amendment*, 85 MINN. L. REV. 1483, 1498 (2001) ("So far, the Court has given us a series of examples [of expressive associations] without any defining principle.").

189. See *infra* text accompanying notes 191-260.

190. See *id.*

191. 357 U.S. 449, 451-52 (1958).

192. *Id.*

addresses of all Alabama residents associated with the NAACP.<sup>193</sup> The NAACP refused to comply on the grounds that the First Amendment right of association protected it from compelled disclosure of its membership lists. The trial court disagreed and held the NAACP in contempt of court. The Alabama Supreme Court refused to hear an appeal.

The United States Supreme Court reversed, holding that members of the NAACP were entitled to “pursue their collective effort to foster beliefs which they . . . have the right to advocate.”<sup>194</sup> The Court then evaluated the governmental action in light of its likely effect on the associational right—the plaintiffs’ collective propensity to engage in the political process.<sup>195</sup> While emphasizing the functional relationship between the right of association and representative democracy, the Court remarked that “[e]ffective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.”<sup>196</sup>

The Court reasoned further that the state’s actions were likely to have a detrimental effect on NAACP members’ right of association and their concomitant ability to advocate for their beliefs.<sup>197</sup> It worried that the state’s disclosure order might “induce members to withdraw from the Association and dissuade others from joining it because of fear of exposure of their beliefs shown through their associations and of the consequences of this exposure.”<sup>198</sup> Because of the substantial impact of the state’s disclosure order on NAACP members’ right of association, the Court subjected the state’s order to strict scrutiny.<sup>199</sup>

Consider also *NAACP v. Button*.<sup>200</sup> In that case, Virginia amended one of its statutes in order to prevent the NAACP from soliciting plaintiffs for civil rights lawsuits.<sup>201</sup> The NAACP filed suit seeking a declaratory judgment that the statute violated the First Amendment. The central question in the case was whether soliciting and engaging in litigation are forms of association.<sup>202</sup>

The Court concluded that the First Amendment right of association protected the NAACP’s activities. It reasoned that “[i]n the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful objectives of equality of

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193. *Id.*

194. *Id.* at 463; *see also id.* at 460 (“It is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the ‘liberty’ assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.”).

195. *Id.* at 460-61.

196. *Id.* at 460.

197. *Id.* at 462.

198. *Id.* at 463.

199. *Id.*; *see also id.* at 460-61.

200. 371 U.S. 415 (1963).

201. *Id.*

202. *Id.* at 428-29.

treatment by all government, federal, state and local, for the members of the Negro community in this country.”<sup>203</sup> The Court went on to explain why associating for purposes of engaging in litigation is a form of political association, at least in this context. It said that although the ballot is the usual method of political association,<sup>204</sup> when that avenue is not available for certain groups, they have no choice but to “turn to the courts.”<sup>205</sup> It then observed that “under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances.”<sup>206</sup> The Court concluded that the First Amendment right of association protected the litigation activities of the NAACP because litigation is a method of political association and participation. The statute at issue thus unduly burdened the associational freedoms of black voters because it prohibited them from associating for the purpose of engaging in litigation.

The Court’s instrumental approach to resolving state interference with associational rights in *Patterson* and *Button* is not aberrational. In a slew of cases that I shall refer to as the “political association cases,” the Court has used the right of association to determine whether individuals, private groups, and political entities are entitled to greater access to the political process and the instrumentalities of the political process such as electoral ballots.<sup>207</sup> As these cases demonstrate, in protecting political association, the First Amendment protects more than mere private association<sup>208</sup>; the First Amendment’s protection also extends to election laws that burden the individual’s right to make free choices and to associate politically through the vote. The main principle of the political association cases is that of effective aggregation: an individual must have a reasonable opportunity to

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203. *Id.* at 429.

204. *Id.*

205. *Id.*

206. *Id.* at 430.

207. The political association cases include *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539 (1963); *United States v. Robel*, 389 U.S. 258 (1967); *Williams v. Rhodes*, 393 U.S. 23 (1968); *Jenness v. Fortson*, 403 U.S. 431 (1971); *Rosario v. Rockefeller*, 410 U.S. 752 (1973); *Kusper v. Pontikes*, 414 U.S. 51 (1973); *Communist Party of Indiana v. Whitcomb*, 414 U.S. 441 (1974); *Storer v. Brown*, 415 U.S. 724 (1974); *Elrod v. Burns*, 427 U.S. 347 (1976); *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173 (1979); *Marchioro v. Chaney*, 442 U.S. 191 (1979); *Branti v. Finkel*, 445 U.S. 507 (1980); *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107 (1981); *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290 (1981); *Clements v. Fashing*, 457 U.S. 957 (1982); *Anderson v. Celebrezze*, 460 U.S. 780 (1983); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986); *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989); *Rutan v. Republican Party of Illinois*, 497 U.S. 62 (1990); *Burdick v. Takushi*, 504 U.S. 428 (1992); *Norman v. Reed*, 502 U.S. 279 (1992); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997); *California Democratic Party v. Jones*, 530 U.S. 567 (2000); *Nixon v. Shrink Missouri Government PAC*, 528 U.S. 377 (2000); and *Federal Election Commission v. Colorado Republican Federal Campaign Committee*, 533 U.S. 431 (2001).

208. See *infra* text accompanying notes 211-60.



join with like-minded others for the purpose of acquiring political power.<sup>209</sup> Stated differently, association enables individuals to amplify their voices to further common political beliefs.<sup>210</sup>

Let us begin with *Kusper v. Pontikes*.<sup>211</sup> In *Kusper*, the Court struck down an Illinois statute that prohibited a voter from voting in the primary of a political party if she had voted in the primary of another political party within the preceding twenty-three months.<sup>212</sup> The plaintiff in this case voted in the Republican primary and unsuccessfully attempted to vote in the Democratic primary the following year.<sup>213</sup>

After recognizing the applicability of the First Amendment freedom of association to the Illinois law in question,<sup>214</sup> the Court noted that the statute substantially restricted the voter's ability to change her party affiliation.<sup>215</sup> The Court then examined the purpose of political parties in the U.S. electoral system and commented that "a basic function" of political parties is to select candidates for presentation to the voters at the general election.<sup>216</sup> Voters associate themselves with a political party in great part "to gain a voice" in the choice of candidates for public office.<sup>217</sup> The Court concluded that the Illinois statute unduly burdened the voter's right of association because the statute prevented the voter "from participating at all" in the primary of her choice.<sup>218</sup> The state deprived the voter "of any voice in choosing the party's candidates, and thus substantially abridged her ability to associate effectively with the party of her choice."<sup>219</sup>

In another case, *Citizens Against Rent Control v. Berkeley*, the plaintiff challenged a California initiative that limited campaign expenditures and contributions.<sup>220</sup> The plaintiff organization, assembled to oppose a ballot measure that would have imposed rent control on some of the city's rental units, violated the contribution limit and was fined by the state

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209. See Samuel Issacharoff, *Groups and the Right to Vote*, 44 EMORY L.J. 869, 883 (1995) ("To be effective, a voter's ballot must stand a meaningful chance of effective aggregation with those of like-minded voters to claim a just share of electoral results.").

210. See Michael Stokes Paulsen, *Scouts, Families, and Schools*, 85 MINN. L. REV. 1917, 1922 (2001).

211. 414 U.S. 51 (1973).

212. *Id.* at 68-69.

213. *Id.* at 52.

214. *Id.* at 56-57 ("There can no longer be any doubt that freedom to associate with others for the common advancement of political beliefs and ideas is a form of 'orderly group activity' protected by the First and Fourteenth Amendments.").

215. *Id.* at 57 (noting that "[t]he effect of the Illinois statute is thus to 'lock' the voter into his pre-existing party affiliation for a substantial period of time following participation in any primary election, and each succeeding primary vote extends this period of confinement").

216. *Id.* at 58.

217. *Id.*

218. *Id.*

219. *Id.*

220. 454 U.S. 290, 292-93 (1981).

regulatory commission.<sup>221</sup> Although the plaintiff prevailed before the lower courts, the California Supreme Court reinstated the fines.<sup>222</sup>

The United States Supreme Court reversed, remarking that the ordinance had a distinctive impact on associational rights.<sup>223</sup> "Under the . . . ordinance an affluent person can, acting alone, spend without limit to advocate individual views on a ballot measure. It is only when contributions are made in concert with one or more others in the exercise of the right of association that they are restricted by" the ordinance.<sup>224</sup> It concluded that the ordinance's exclusive and disproportionate impact on collective activity unduly burdened the plaintiff's right of association. The Court stated that "the practice of persons sharing common views banding together to achieve a common end is deeply embedded in the American political process."<sup>225</sup> Association is important because "by collective effort individuals can make their views known, when individually, their voices would be faint or lost."<sup>226</sup> The ordinance burdened associational rights because it impermissibly "hobble[d] the collective expressions of a group"<sup>227</sup> and diminished "the right of people to make their voices heard on public issues."<sup>228</sup>

*Kusper* and *Citizens Against Rent Control* show that an electoral law, rule, structure, or device that significantly burdens the individual's right to make free choices and associate effectively through the ballot impairs the individual's right of association. This understanding sheds light on a number of political association cases that are otherwise difficult to explain, such as *Anderson v. Celebrezze*.<sup>229</sup> In *Celebrezze*, the Court addressed the constitutionality of Ohio's early filing deadline. Ohio required independent candidates who wanted a place on the ballot to declare their candidacy earlier than candidates nominated by political parties.<sup>230</sup> The plaintiffs, Anderson and a diverse group of voters, argued that the early filing deadline violated their right of association and the Equal Protection Clause.<sup>231</sup> The Court agreed.

The Court's analysis in *Celebrezze* is important and interesting in many respects. First, although the deadline denied the candidate access to the ballot, the Court focused on the denial's impact on voters. Its main

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221. *Id.*

222. *Citizens Against Rent Control v. Berkeley*, 614 P.2d 742, 749 (Cal. 1980).

223. *Citizens Against Rent Control*, 454 U.S. at 296.

224. *Id.*

225. *Id.* at 294.

226. *Id.*

227. *Id.* at 296.

228. *Id.* at 295.

229. 460 U.S. 780 (1983).

230. *Id.* at 780-83.

231. *Id.* at 783.

concern was protecting the voter's right to associate in order to advance a political candidate and to further the voter's political beliefs.<sup>232</sup>

Second, the Court acknowledged that a wide variety of electoral rules, structures, and laws indirectly suppress associational activities. The Court noted that states enact "comprehensive and sometimes complex election codes" that regulate almost all aspects of the electoral process.<sup>233</sup> Each regulation "inevitably affects—at least to some degree—the individual's right to vote and his right to associate with others for political ends."<sup>234</sup> Thus, the associational claim is not limited to certain types of laws or electoral structures but is potentially applicable to all aspects of the electoral process.

Third, although the Court recognized that exclusion of candidates from electoral ballots burdened two different rights—the right to vote and "the right of individuals to associate for the advancement of political beliefs"<sup>235</sup>—the Court declined to rest its decision on the Equal Protection Clause.<sup>236</sup> This move is significant because the Court had decided a substantial number of ballot access cases prior to *Celebrezze* principally on equal protection grounds.<sup>237</sup> Thus, in that regard, *Celebrezze* is a marked departure from precedent.

By abandoning an equal protection analysis in favor of a political association analysis, the Court indicates that something more is at stake here than a right to express oneself politically through the vote. The Court did not protect political association simply because association facilitates political expression; rather, association is also valuable because it enables the voter to maximize his or her ability to acquire political power.

Admittedly, the Court did not articulate this point in *Celebrezze* with the utmost pellucidity. Consider the Court's explanation for the proposition that exclusion of candidates burdens associational rights. The Court reasoned that "an election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying point for like-minded citizens."<sup>238</sup> From that explanation, one might conclude that the purpose of political association is only to provide a platform for political expression: expression for the sake of expression. Consequently, political association would be facilitated to the extent that voters are able to discuss the issues of the day and find a candidate to rally around.

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232. *Id.* at 806; *see also id.* at 786.

233. *Id.* at 788.

234. *Id.*

235. *Id.* at 787 (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)).

236. *See id.* at 786-87 n.7 (noting the Court's decision not to "engage in a separate Equal Protection Clause analysis").

237. *Id.*; *see also* Ill. State Bd. of Elections v. Socialist Workers Party, 440 U.S. 173 (1979); Am. Party of Tex. v. White, 415 U.S. 767 (1974); Storer v. Brown, 415 U.S. 724 (1974); Lubin v. Panish, 415 U.S. 709 (1974); Bullock v. Carter, 405 U.S. 134 (1972); *Williams v. Rhodes*, 393 U.S. 23 (1968).

238. *Celebrezze*, 460 U.S. at 788.

However, it would be shortsighted to conclude that *Celebrezze* and the political association cases more generally are concerned solely with political expression.<sup>239</sup> The Court's true explanation emerged in the footnote supporting the proposition that Ohio's early filing deadline burdened associational rights. Quoting from *Williams v. Rhodes*, the Court stated that "the right to form a party for the advancement of political goals means little if a party can be kept off the election ballot and thus denied an equal opportunity to win votes."<sup>240</sup> The Court also quoted Harlan's concurrence to the opinion, in which he maintained that by denying minor parties "any opportunity to participate in the procedure by which the President is selected, the State has eliminated the basic incentive that all political parties have for conducting such activities."<sup>241</sup> The Court continued to emphasize this theme in the text, where it suggested that the problem with the early filing deadline was that it limited the chances of a distinct group of voters—"independent-minded voters"—to associate and thus strengthen their effectiveness as a group.<sup>242</sup> This restriction "threaten[ed] to reduce diversity and competition in the marketplace of ideas."<sup>243</sup>

The Court's reliance upon the right of association as a justification for its decision in *Celebrezze* makes sense when one acknowledges the unique contribution of the right of association to an analysis of political rights. *Celebrezze* is not about the right to vote or cast a ballot; if it were, the Court would have more properly grounded its decision in the Equal Protection Clause.<sup>244</sup> The case is also not about the right of the individual

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239. See, e.g., *Mancuso v. Taft*, 476 F.2d 187, 196 (1st Cir. 1973) ("[T]he freedom to associate is intimately related with the concept of making expression effective.").

240. *Celebrezze*, 460 U.S. at 788 n.8 (quoting *Williams*, 393 U.S. at 31).

241. *Id.* (quoting *Williams*, 393 U.S. at 41 (Harlan, J., concurring)).

242. *Id.* at 794.

243. *Id.*

244. Although a full description of the topic is beyond the scope of this Article, it is worth pointing out the superiority of the First Amendment right of association approach over the Fourteenth Amendment equal protection approach to voting rights. First, whereas the Fourteenth Amendment approach is mired in controversial concepts such as individual rights versus group rights and vote dilution, these and analogous concepts are widely accepted as necessary to the right of association. Second, as a number of commentators have noted, the Court's Fourteenth Amendment jurisprudence reflects a crabbed conception of political rights that focuses almost exclusively on the vote. See, e.g., Tucker, *supra* note 11, at 415-26. In contrast, the Court's First Amendment jurisprudence reflects a more expansive approach to political rights beyond the formal right to vote. See Samuel Issacharoff, *Private Parties with Public Purposes: Political Parties, Associational Freedoms, and Partisan Competition*, 101 COLUM. L. REV. 274, 290 (2001) ("The First Amendment is increasingly seen as both instrumental in securing the conditions necessary for democratic governance, and as a participatory vehicle for greater citizen involvement in public discourse."). Thus, the Court has protected as political activity ballot access, political party autonomy, and the right to contribute to political campaigns. Third, while the Court's Fourteenth Amendment jurisprudence has helped to provide access to the political process for voters of color, the Court has not reliably protected the political rights of voters of color. A First Amendment-centric approach to political rights would take into account the political rights of voters of color without focusing exclusively on race. Finally, although a right to vote flows awkwardly, if at all, from the Fourteenth Amendment, a right to vote is critical to core First Amendment values

to express herself politically; if it were, the Court would have analyzed it as a freedom of expression case. By moving away from the Equal Protection Clause and toward political association and by focusing on voters as opposed to candidates, *Celebrezze* clarified the contours of the right of political association. The right focuses on the voters and their ability to wield political influence.<sup>245</sup> The early filing deadline impaired associational rights precisely because it limited the opportunity of an identifiable group of like-minded voters to acquire political power.<sup>246</sup>

Although in *Celebrezze* ballot access was an indispensable prerequisite, the associational claim need not be so limited.<sup>247</sup> The Court's recent political association cases have more explicitly emphasized the consequential or instrumental nature of the associational right. For example, in *Tashjian v. Republican Party of Connecticut*, the Republican Party challenged a Connecticut statute that prohibited a voter from voting in a party primary unless the voter was a registered member of that party.<sup>248</sup> The Republican Party adopted a party rule to encourage independent voters to vote in Republican primaries.<sup>249</sup> The party rule clashed with the state statute, which required a closed primary.<sup>250</sup> The plaintiffs argued that the statute "impermissibly burden[ed] the right of its members to determine for themselves with whom they will associate, and whose support they will seek, in their quest for political success."<sup>251</sup> The plaintiffs maintained that the state reduced their ability to acquire political power by precluding them from seeking the support of putative like-minded others.

The Court agreed and noted that the statute curtailed the pool of individuals with whom the plaintiffs could associate, thereby denying them the opportunity to "broaden the base of public participation in and support for

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such as self-government and autonomy. If these values are to be meaningful, the right to vote must be the center of any viable theoretical constellation of political rights.

245. As the Court stated in *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000), "[r]epresentative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." See also *Abrams*, *supra* note 11, at 473-75.

246. The Court explained:

As our cases have held, it is especially difficult for the State to justify a restriction that limits political participation by an identifiable political group whose members share a particular viewpoint, associational preference, or economic status. "Our ballot access cases . . . focus on the degree to which the challenged restrictions operate as a mechanism to exclude certain classes of candidates from the electoral process. The inquiry is whether the challenged restriction unfairly or unnecessarily burdens the 'availability of political opportunity.'"

*Celebrezze*, 460 U.S. at 792-93 (quoting *Clements v. Fashing*, 457 U.S. 957, 964 (1982) (plurality opinion) (quoting *Lubin v. Panish*, 415 U.S. 709, 716 (1974))).

247. See *infra* text accompanying notes 260-86 (arguing that any electoral device may burden associational rights).

248. 479 U.S. 208, 210-12 (1986).

249. *Id.* at 212.

250. CONN. GEN. STAT. § 9-431 (1985), amended by 1987 Conn. Acts 509, § 1 (Reg. Sess.).

251. *Tashjian*, 479 U.S. at 214.

[their] activities.”<sup>252</sup> Limiting the plaintiffs’ pool of potential associates denied them the ability to “‘identify the people who constitute the association,’”<sup>253</sup> a necessary component of “‘the freedom to join together in furtherance of common political beliefs.’”<sup>254</sup> In other words, the state restricted the plaintiffs’ ability to appeal to individuals who might be of similar political orientation or who could be persuaded to support the plaintiffs’ cause.<sup>255</sup> The Court then concluded that the state “limit[ed] the [Party’s] associational opportunities at the crucial juncture at which the appeal to common principles may be translated into concerted action, and hence to *political power in the community*.”<sup>256</sup>

An additional important lesson to be drawn from *Tashjian*, *Kusper*, and perhaps political association cases more broadly is that political winners and losers—defined as both people (candidates) and ideas—ought to be the product of the political marketplace and political competition.<sup>257</sup> One characterization of the problem in *Tashjian* and *Kusper* is that the state sought to determine political outcomes, as opposed to allowing the political market to dictate political outcomes, by reducing political competition through limiting the pool of individuals the plaintiffs could reach out to for political support.<sup>258</sup> The state stunted the process of democracy. The

252. *Id.*

253. *Id.* (quoting *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981)).

254. *Id.* See also *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214 (1989); *La Follette*, 450 U.S. at 122.

255. *Tashjian*, 479 U.S. at 215-16 (“The statute here places limits upon the group of registered voters whom the Party may invite to participate in the ‘basic function’ of selecting the Party’s candidates.”).

256. *Id.* at 216 (emphasis added). For other cases conducting similar analyses, see *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989).

257. This lesson may simply be an application of a greater value of democratic self-governance identified by Professor Post. See Post, *supra* note 10, at 279; see also Robert Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1275 (1995). Professor Post explained that First Amendment doctrine “seeks to sustain the value of self-government by reconciling individual and collective autonomy through the medium of public discourse.” *Id.* “[T]he function of public discourse is to reconcile, to the extent possible, the will of individuals with the general will. Public discourse is thus ultimately grounded upon a respect for individuals seen as ‘free and equal persons.’” Post, *supra* note 10, at 284. Individuals cannot be free and equal if the state is coercing their consent. See DON HERZOG, *HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY* 199 (1989). Consequently, it is sensible for the Court to police strictly the channels of democracy, the medium through which consent is procured.

258. On this score, I agree with Professors Issacharoff and Pildes, who emphasized the relevance of political competition to legitimating political outcomes. See, e.g., Samuel Issacharoff, *Gerrymandering and Political Cartels*, 116 HARV. L. REV. 593, 617 (2002) [hereinafter Issacharoff, *Gerrymandering*]; Samuel Issacharoff, *Why Elections?*, 116 HARV. L. REV. 684, 686 (2002); Issacharoff & Pildes, *supra* note 8, *passim*; Richard H. Pildes, *The Theory of Political Competition*, 85 VA. L. REV. 1605, 1616 (1999). Their argument is based upon the important insight that “democratic politics . . . is not an autonomous realm of parties, public opinion, and elections, but a product of specific institutional structures and legal rules.” Issacharoff & Pildes, *supra* note 8, at 644.

political association cases are clearly concerned with the possibility of political elites biasing political outcomes in their favor by the manner in which they structure democratic institutions and electoral rules.<sup>259</sup>

As the political association cases reveal, the First Amendment protects an individual's right to associate politically through the vote and otherwise.<sup>260</sup> This right is burdened impermissibly when a state law, rule, or electoral structure denies an individual the reasonable opportunity to join with like-minded others for the purpose of furthering common political beliefs.

## 2. *The Right of Association Applies to Electoral Structures*

Nothing about electoral structures should remove them from the purview of the First Amendment. In fact, the Court acknowledged in *Anderson v. Celebrezze* that each provision of state-enacted election codes affects to some degree the rights to vote and to associate for political reasons.<sup>261</sup> Moreover, courts and commentators have long recognized that the composition and makeup of democratic structures affect political rights, in particular the right to vote.<sup>262</sup>

As a starting point for the argument that the right of association applies to electoral structures, let us examine more specifically the relationship between voting as a political activity and the design of democratic structures.<sup>263</sup> As many commentators have recognized, although voting is

259. Michael J. Klarman, *Majoritarian Judicial Review: The Entrenchment Problem*, 85 GEO. L.J. 491, 522 (1997).

260. *Burdick v. Takushi*, 504 U.S. 428 (1992); *Ill. State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979); *Storer v. Brown*, 415 U.S. 724, 728-29 (1974); *Williams v. Rhodes*, 393 U.S. 23, 30 (1968); *see also* *Mariani v. United States*, 212 F.3d 761, 771 (3d Cir. 2000); *Sowards v. Loudon County, Tenn.*, 203 F.3d 426, 432 (6th Cir. 2000); *Touchston v. McDermott*, 234 F.3d 1133, 1154 (11th Cir. 2000) (Tjoflat, J., dissenting).

261. 460 U.S. 780, 788 (1983).

262. *See* *Gaffney v. Cummings*, 412 U.S. 735, 753 (1973) ("District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely."); *Reynolds v. Sims*, 377 U.S. 533, 559-60 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963); *Baker v. Carr*, 369 U.S. 186 (1962); Luis Fuentes-Rohwer, *Baker's Promise, Equal Protection, and the Modern Redistricting Revolution: A Plea for Rationality*, 80 N.C. L. REV. 1353, 1386 (2002) (discussing incumbency protection via voter redistricting); Luis Fuentes-Rohwer, *Doing Our Politics in Court: Gerrymandering, "Fair Representation" and an Exegesis into the Judicial Role*, 78 NOTRE DAME L. REV. 527, 536 (2003) [hereinafter Fuentes-Rohwer, *Doing Our Politics in Court*] (describing the inherent tensions in the redistricting process); Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 YALE L. & POL'Y REV. 301, 310 (1991) (noting the necessarily partisan nature of redistricting); James Thomas Tucker, *Redefining American Democracy: Do Alternative Voting Systems Capture the True Meaning of "Representation"?*, 7 MICH. J. RACE & L. 357, 360-64 (2002) (explaining various alternative voting systems and their effect on voters' political rights).

263. Note that even though this discussion is about voting, my arguments are intended to apply to political participation more broadly. Voting is important in this discussion not only because of the central role it plays in a democratic society but also because it is a useful stand-in for thinking about

in part a symbolic act,<sup>264</sup> it is more than a ritual significant solely for its expressive or signifying value.<sup>265</sup> Voting is also a consequential political act with attendant and intended political ramifications.<sup>266</sup> In other words, voting is instrumental.<sup>267</sup> Consider the following observation by Professor Guinier: "the right to vote is a claim about the fundamental right to express and represent ideas. Voting is not just about winning elections. People participate in politics to have their ideas and interests represented, not simply to win contested seats."<sup>268</sup> Consider also Professor Karlan's insight on this issue: "the functional point of voting is to aggregate individuals' preferences and to allocate political power (and ultimately the benefits and burdens the government confers) among groups."<sup>269</sup> Put differently, "the right of the individual to participate politically is a right best realized in association with other individuals, *i.e.*, as a group."<sup>270</sup>

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political participation in a democratic polity. See ROBERT D. PUTNAM, *BOWLING ALONE: THE COLLAPSE AND REVIVAL OF AMERICAN COMMUNITY* 35 (2000) ("Voting is by a substantial margin the most common form of political activity, and it embodies the most fundamental democratic principle of equality. . . . Moreover, like the canary in the mining pit, voting is an instructive proxy measure of broader social change."). See also HERZOG, *supra* note 257, at 199-213.

264. James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 906 (1997) ("To seek the vote is to seek formal recognition as a full member of society; to be denied the vote is to be either excluded altogether from membership in the community or consigned to some kind of second-class citizenship."); HERZOG, *supra* note 257, at 219 ("For having the right to participate in politics identifies one as a full member of the community; it recognizes and so helps constitute one as a dignified equal."); Samuel Issacharoff & Pamela S. Karlan, *The Hydraulics of Campaign Finance Reform*, 77 TEX. L. REV. 1705, 1724 (1999); Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443, 451 (1989); JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 26 (1991) (stating that the act of voting is "an affirmation of belonging"). For an argument on the dignitary underpinnings of the Reconstruction Amendments, see Amar & Brownstein, *supra* note 11, at 928-35.

265. See Amar & Brownstein, *supra* note 11, at 924-25 ("Voting is much more than an assertion of dignity or an expression of belief."); see also *id.* at 922 (describing the "hybrid nature of voting"); Pamela S. Karlan, *Undoing the Right Thing: Single-Member Offices and the Voting Rights Act*, 77 VA. L. REV. 1, 5 (1991) (drawing a distinction between the formal and functional importance of the right to vote).

266. Pamela S. Karlan, *The Rights to Vote: Some Pessimism About Formalism*, 71 TEX. L. REV. 1705, 1707-08 (1993).

267. As the political scientists Wolfinger and Rosenstone have stated, "[e]lections are at the core of the American political system. They are the way we choose government leaders, a source of the government's legitimacy, and a means by which citizens try to influence public policy. And for most Americans, voting is the only form of political participation." RAYMOND E. WOLFINGER & STEVEN J. ROSENSTONE, *WHO VOTES* 1 (1980).

268. LANI GUINIER, *THE TYRANNY OF THE MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY* 93 (1994).

269. Karlan, *supra* note 11, at 1711; see also Amar & Brownstein, *supra* note 11, at 925 ("Voting is about the exercise of power."); Karlan, *supra* note 11, at 1708, 1711-14.

270. GUINIER, *supra* note 268, at 125. See also Gerken, *supra* note 11, at 1677 ("[A]n individual's ability to aggregate her vote with others matters in a representative democracy.").



An electoral structure, such as a voting district, is both a metaphysical space<sup>271</sup> and a physical space<sup>272</sup> that the state creates. In this regard, an electoral structure is indistinguishable from other state laws that regulate the voting process, such as laws that create ballots and govern their use. The structure's principal purpose is to facilitate political self-governance, political representation, and political communication.<sup>273</sup> As one commentator noted, "[r]edistricting is about power, its allocation and reallocation."<sup>274</sup> Electoral structures accomplish their purpose by aggregating the votes of individuals on the basis of the state's perception of voters' common interests.<sup>275</sup>

Democratic structures affect an individual's ability to aggregate his vote with others and thereby maximize his political power in a number of ways.<sup>276</sup> First, the choice of an electoral structure itself—whether single-member system, at-large system, cumulative voting system, or something else—can profoundly affect an individual's ability to aggregate his or her vote with others.<sup>277</sup> For example, some scholars have debated whether at-large systems more so than single-member systems diminish the voting power of voters of color.<sup>278</sup> Others argue that certain types of structures

271. But a metaphysical space is not ipso facto worthy of less constitutional protection. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995).

272. The following instruction from Richard Fenno, a political scientist who conducted a study of members of the House of Representatives, convinced me to change my initial intuition, which was to characterize election districts as constituting only metaphysical spaces. Fenno wrote:

[The district is] the entity to which, from which, and within which the member travels. It is the entity whose boundaries have been fixed by state legislative enactment or by court decision. . . . We capture more of what the member has in mind when conjuring up "my district," however, if we think of it as the *geographical constituency*. We then retain the idea that the district is a legally bounded space, and emphasize that it is located in a particular place.

RICHARD F. FENNO JR., *HOME STYLE: HOUSE MEMBERS IN THEIR DISTRICTS I* (1978).

273. Joseph F. Zimmerman, *The Single-Member District System: Can It Be Reformed?*, 70 NAT'L CIV. REV. 255, 255 (1981) ("An ideal local government electoral system should maximize effectiveness of ballots cast, voter participation at the polls, responsiveness of elected officials, access to decision makers, equity in representation and legitimization of the governing body."). See also Henry L. Chambers Jr., *Enclave Districting*, 8 WM. & MARY BILL RTS. J. 135, 153-58 (1999).

274. Alan Gartner, *New York City Redistricting: A View from Inside*, in RACE AND REDISTRICTING IN THE 1990s 367 (Bernard Grofman ed., 1998).

275. Gerken, *supra* note 11, at 1679.

276. As Professor Abrams rightly reminds us, "political participation is not a single event, but a temporally extended process that begins with reflection on and formulation of substantive preferences and continues through the implementation of those preferences through the efforts of elected representatives." Kathryn Abrams, *Relationships of Representation in Voting Rights Act Jurisprudence*, 71 TEX. L. REV. 1409, 1417 (1993).

277. Zimmerman, *supra* note 273, at 255 ("The various types of electoral systems . . . measure up differently in terms of . . . canons of a good electoral system.").

278. Compare Richard L. Engstrom & Michael D. McDonald, *The Effect of At-Large Versus District Elections on Racial Representation in U.S. Municipalities*, in ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES 203, 220-25 (Bernard Grofman & Arend Lijphart eds., 1986) (finding that districted elections increase descriptive representation for African American voters but may not necessarily improve governmental responsiveness), Richard L. Engstrom & Michael D. McDonald, *The*

facilitate voter turnout.<sup>279</sup> There are other scholars who note that the combination of single-member districts and plurality voting results in the hegemony of two parties to the near exclusion of third parties.<sup>280</sup> These studies do not even begin to exhaust scholarly examinations of the political consequences of electoral structures.<sup>281</sup>

Second, how one draws district lines can also affect the aggregation right, even after one has chosen a particular structure—for example, the single-member system.<sup>282</sup> Here, too, the literature is quite voluminous. Some scholars argue that the manner in which district lines are drawn predictably favors one political party at the expense of another.<sup>283</sup> Others explain how districting may inure to the benefit of incumbents.<sup>284</sup> Still others demonstrate how electoral line drawing may dilute the votes of voters

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*Underrepresentation of Blacks on City Councils: Comparing the Structural and Socioeconomic Explanations for South/Non-South Differences*, 44 J. POL. 1088, 1089-90 (1982), and Susan Welch, *The Impact of At-Large Elections on the Representation of Blacks and Hispanics*, 52 J. POL. 1050, 1051-53 (1990) (finding that African Americans are best represented by district elections but that they are making gains in at-large systems), with Charles S. Bullock III & Susan A. MacManus, *Staggered Terms and Black Representation*, 49 J. POL. 543, 544 (1987), and Charles S. Bullock III & Susan A. MacManus, *Testing Assumptions of the Totality-of-the-Circumstances Test: An Analysis of the Impact of Structures on Black Descriptive Representation*, 21 AM. POL. Q. 290 (1993).

279. See, e.g., Robert W. Jackman, *Political Institutions and Voter Turnout in the Industrial Democracies*, 81 AM. POL. SCI. REV. 405, 407-09 (1987); Jeffrey A. Karp & Susan A. Banducci, *The Impact of Proportional Representation on Turnout: Evidence from New Zealand*, 34 AUS. J. POL. SCI. 363 (1999); Richard J. Timpone, *Structure, Behavior, and Voter Turnout in the United States*, 92 AM. POL. SCI. REV. 145, 145-46 (1998).

280. MAURICE DUVERGER, *POLITICAL PARTIES: THEIR ORGANIZATION AND ACTIVITY IN THE MODERN STATE* (1962). For refinements of Duverger's view, see William H. Riker, *Duverger's Law Revisited*, in *ELECTORAL LAWS AND THEIR POLITICAL CONSEQUENCES* 19 (Bernard Grofman & Arend Lijphart eds., 1986).

281. See DAVID M. FARRELL, *COMPARING ELECTORAL SYSTEMS* 1 (1997) (noting that at least twenty-five hundred studies address the political consequences of electoral structures).

282. See FRANCES FOX PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 18-20 (1988). Piven and Cloward maintained that politics is a "dynamic" process. *Id.* at 20. By "dynamic" they mean that the types of electoral structures affect the types of people who participate, which in turn affect the types of electoral structures that affect the types of people who participate, and on and on. Assuredly, a fair amount of political activity occurs across electoral structures, but electoral structures serve to cabin or determine the scope of political communication in important ways. For example, one's district in significant part determines for whom one votes. Similarly, although voters may contact politicians who do not represent them, they are more likely to contact representatives within their districts. Voters may contribute to candidates' campaigns outside their districts, but they are more likely to contribute to candidates within their districts. Voters may engage in get-out-the-vote efforts outside their districts, but they are much more likely to do so within their districts.

283. DAVID BUTLER & BRUCE E. CAIN, *CONGRESSIONAL REDISTRICTING: COMPARATIVE AND THEORETICAL PERSPECTIVES* (1992); GARY W. COX & JONATHAN N. KATZ, *ELBRIDGE GERRY'S SALAMANDER: THE ELECTORAL CONSEQUENCES OF THE REAPPORTIONMENT REVOLUTION* (2002); Bruce E. Cain, *Assessing the Partisan Effects of Redistricting*, 79 AM. POL. SCI. REV. 320, 320-22 (1985).

284. COX & KATZ, *supra* note 283, at 127-40 (noting that the reapportionment revolution may have increased, at least in part, the incumbency advantage); Andrew Gelman & Gary King, *Enhancing Democracy Through Legislative Redistricting*, 88 AM. POL. SCI. REV. 541 (1994).

of color and political minorities.<sup>285</sup> A number of scholars have addressed the policy implications of majority-minority districts.<sup>286</sup>

The conclusion is inescapable: the type of political structure profoundly impacts the associational rights of the electorate.<sup>287</sup> The design of democratic structures may burden associational rights in the same manner that the initiative in *Citizens Against Rent Control* or the denial of ballot access in *Celebrezze* burdened associational rights. Similarly, electoral structures may impede the individual's ability to gather political power in the same manner as the state statute in *Tashjian* or the primary rule in *Kusper* did. Just as ballot access is critical to the associational functions of individuals and political parties, electoral structures are crucial to the ability of groups of voters to aggregate their political power and exercise legislative influence. Consequently, electoral structures come within the ambit of the First Amendment right of association because they may limit

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285. BERNARD GROFMAN ET AL., MINORITY REPRESENTATION AND THE QUEST FOR VOTING EQUALITY (1992); MINORITY VOTE DILUTION (Chandler Davidson ed., 1989); Frank Parker, *Racial Gerrymandering and Legislative Reapportionment*, in MINORITY VOTE DILUTION 85, *supra*; QUIET REVOLUTION IN THE SOUTH: THE IMPACT OF THE VOTING RIGHTS ACT, 1965-1990 (Chandler Davidson & Bernard Grofman eds., 1994).

286. Bernard Grofman & Lisa Handley, *Estimating the Impact of Voting-Rights-Related Districting on Democratic Strength in the U.S. House of Representatives*, in RACE AND REDISTRICTING IN THE 1990S 51 (Bernard Grofman ed., 1998); CANON, *supra* note 142, at 93-142; Charles Cameron et al., *Do Majority-Minority Districts Maximize Substantive Black Representation in Congress?*, 90 AM. POL. SCI. REV. 794, 795 (1996); David Epstein & Sharyn O'Halloran, *Measuring the Electoral and Policy Impact of Majority-Minority Districts*, 43 AM. J. POL. 367 (1999); Kevin Hill, *Does the Creation of Majority-Minority Districts Aid Republicans? An Analysis of the 1992 Congressional Elections in Eight Southern States*, 57 J. POL. 384, 387 (1995); DAVID LUBLIN, THE PARADOX OF REPRESENTATION: RACIAL GERRYMANDERING AND MINORITY INTERESTS IN CONGRESS (1997). We can include here some important work by David Canon and his colleagues arguing that the manner in which state actors construct majority-minority districts affects the choices of potential candidates, which in turn profoundly affects the type of representation that voters will enjoy in those districts. See CANON, *supra* note 142, at 93-142; David Canon et al., *The Supply-Side Theory of Racial Redistricting: Race and Strategic Politicians, 1972-1992*, 58 J. POL. 846, 848-51 (1996). Claudine Gay's recent article is also quite important. She found that white Americans in majority-minority congressional districts are more likely to be less politically engaged, presumably a function of their minority status, when their representative is African American than when he or she is some other race. Additionally, Professor Gay's study concluded that African American voters in majority-minority districts are not more likely to be politically engaged than those in other districts. Thus, majority-minority districts had a negative effect on the political behavior of whites and no effect on the political behavior of African Americans. See Claudine Gay, *The Effect of Black Congressional Representation on Political Participation*, 95 AM. POL. SCI. REV. 589 (2001). Finally, in their study of the impact of black constituency size on the policy interests of African Americans, Vincent Hutchings and his colleagues explored the effect of the size of the black constituency on white representatives. They concluded that Southern white representatives and Northern white representatives were affected differently by the racial compositions of their districts. Among Southern whites, black constituency size had some effect but the results were not consistent. Among Northern whites, black constituency size did not affect the representative's support for policies that are important to the black community. However, it did reduce the variance of support for those interests. See Vincent Hutchings, Harwood McClerking & Guy-Uriel Charles, *Congressional Representation of Black Interests: Recognizing the Importance of Stability* (forthcoming JOURNAL OF POLITICS 2003).

287. See *supra* text accompanying notes 265-70.

political participation by impermissibly burdening the individual's ability to aggregate with like-minded others to exercise political power.

### 3. *How Electoral Structures Might Burden Associational Rights*

Returning to the hypothetical Bliss, we can now understand why adoption of the Race-Blind Plan impairs the associational interest of Blissians of color in violation of the First Amendment. The plan burdens their associational rights because it significantly limits their ability to aggregate their vote with like-minded others for the purpose of acquiring political power.<sup>288</sup> As I have argued in this Part, individuals who utilize the ballot—and certainly those who vote alike—are engaged in a collective political enterprise.<sup>289</sup> The plan significantly reduces the instrumental effectiveness of Blissians of color by splitting their votes and depriving them of the political power that they could wield in an alternative electoral structure.

The plan burdens associational rights in a number of ways that implicate the Court's political association jurisprudence. First, like the electoral law at issue in *Anderson v. Celebrezze*, adoption of the Race-Blind Plan would burden the associational freedom of an identifiable group of voters.<sup>290</sup> The electoral change represented by the Race-Blind Plan would disproportionately impact Blissians of color because the plan would make it more difficult for them than for white voters to associate politically. The group here is defined not simply by race but by the product of the interaction between race and ideology.<sup>291</sup> Thus, as in *Celebrezze*, this group of voters "share[s] a particular viewpoint, [an] associational preference," and perhaps the same socioeconomic status.<sup>292</sup>

Second, the Race-Blind Plan suffers from the same defect the Court found troubling in *Kusper v. Pontikes*.<sup>293</sup> Recall that in *Kusper* the Court explained that the Illinois statute—which prevented the voter from changing partisan identification for twenty-three months—burdened the voter's right of association because the statute "lock[ed] the voter into his pre-existing party affiliation for a substantial period of time following

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288. Once again, I am using voting both illustratively and because of its democratic importance. Similar arguments can be advanced using other means of political participation.

289. GUINIER, *supra* note 268, at 125; SHKLAR, *supra* note 264.

290. 460 U.S. 780, 793 (1983).

291. See *Thornburg v. Gingles*, 478 U.S. 30, 56 (1986) ("A showing that a significant number of minority group members usually vote for the same candidates is one way of proving the political cohesiveness . . ."); GUINIER, *supra* note 268, at 94; Michael A. Hess, *Beyond Justiciability: Political Gerrymandering After Davis v. Bandemer*, 9 CAMPBELL L. REV. 207, 234 (1987) ("The most readily identifiable voting group is one based on political affiliation and voting patterns."); see also Hess, *supra*, at 234 n.128.

292. 460 U.S. at 793.

293. 414 U.S. 51 (1973).

participation in any primary.”<sup>294</sup> As the Court understood the Illinois statute, the problem was that the state, rather than Mrs. Pontikes, chose Mrs. Pontikes’s political status. The state effectively communicated to Mrs. Pontikes that she would be a Republican for the next twenty-three months whether she liked it or not.<sup>295</sup> If she wanted to associate with the Democrats she would have to wait twenty-three months and not vote in any primaries in the meantime.<sup>296</sup>

The Race-Blind Plan is similarly flawed. As in *Kusper*, the state, rather than the individual, is choosing the individual’s political status. The state is effectively telling Blissians of color that they will be a political minority. If Blissians of color wish to associate with one another so as to affect their political status they must wait at least until the next decennial, provided they live within sufficient geographic proximity of one another. This is the type of lock-in the Court found troubling in *Kusper*.<sup>297</sup>

Third, the effect of the Race-Blind Plan’s colorblindness requirement would be to limit the ability of voters of color to identify like-minded others at a crucial moment in the process. As the Court recognized in *Tashjian v. Republican Party of Connecticut*, the ability to acquire political power is predicated upon the ability to appeal to likely allies.<sup>298</sup> Unfortunately for Blissians of color, the state reduced the pool of potential allies in the Race-Blind Plan. The state’s choice of electoral structure would remove the most likely candidates with whom Blissians of color could associate. The Race-Blind Plan would violate the principle that it is the individual who can choose with whom to associate and whom to solicit as potential political associates or allies. Had the state chosen a less restrictive electoral structure, Blissians of color might have chosen different associates than those dictated by the state.

We can now see how the Race-Blind Plan interferes with the First Amendment right of political association, which protects the freedom of individuals to join together in the pursuit of common political ends. As the Court stated in *Citizens Against Rent Control*, the “practice of persons sharing common views [and] banding together to achieve a common end is deeply embedded in the American political process. . . . Its value is that by collective effort individuals can make their views known, when

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294. *Id.* at 57.

295. *Id.* at 57-58.

296. *Id.*

297. To be clear, I am not arguing that voters—of color or otherwise—have a right to be political majorities. The point here is simply that the state cannot determine political power. As I have explained in this Article, one of the principles of the political association cases is that the state cannot take it upon itself to determine political winners and losers. See *supra* text accompanying notes 256-59. The political marketplace must make these determinations. The state unconstitutionally burdens the right of political association when the state, through its choice of laws and structures, unduly impacts political outcomes.

298. 479 U.S. 208, 214 (1986).

individually, their voices would be faint or lost."<sup>299</sup> Through political participation, citizens "band together in promoting among the electorate candidates" to represent them and the policies that reflect their political views.<sup>300</sup> The key here is that the state's choice of electoral structures can facilitate or inhibit an individual's attempt to acquire political power by combining his or her political interests with those of like-minded others. A democratic structure that interferes with the individual's ability to engage in this collective endeavor unduly burdens the individual's freedom of association.

The First Amendment, particularly the right of association, is relevant to the design of democratic structures. Specifically, where race and political identity correlate, the state cannot design electoral structures that unduly burden the associational rights of voters of color. This is an important step, but it is not enough. Although the state's design of democratic structures implicates the First Amendment and may infringe the associational right of particular voters, it does not automatically violate the First Amendment.<sup>301</sup> Before reaching this conclusion, we must first discern the state's interest in choosing certain electoral structures over others.

#### IV

##### LIBERTY, EQUALITY, AND IDENTITY: EXAMINING STATE INTEREST

State action that burdens associational activity is unconstitutional unless the state is regulating pursuant to a compelling interest and the law is narrowly tailored to advance that interest.<sup>302</sup> Although a state's interest in promulgating a specific electoral structure is difficult to surmise in the abstract, a fundamental objection to race consciousness in the design of democratic structures is that race-conscious state action violates the Equal Protection Clause. Thus, one of the state's best objections and its most compelling argument for erecting colorblind electoral structures is an equality interest.

The state can justify its assertion of an equality interest upon a number of grounds. For example, the state may believe it has a general interest in promoting equality or in fulfilling the Constitution's command to equality by insisting upon colorblindness. The proposition here is that American society's ultimate goal, as reflected in the Constitution, is one of colorblindness. Although we may take necessary detours in the attainment of

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299. *Citizens Against Rent Control v. Berkeley*, 454 U.S. 290, 294 (1981).

300. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 574 (2000).

301. *Burdick v. Takushi*, 504 U.S. 428 (1992).

302. *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989); *Boy Scouts of Am. v. Dale*, 530 U.S. 640, 648 (2000) (stating that state action that interferes with expressive activity violates the First Amendment unless the state is regulating pursuant to "compelling . . . interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms") (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)).

that goal,<sup>303</sup> colorblindness is nevertheless set forth as the ideal toward which we must always strive.<sup>304</sup> This colorblindness rationale is amply reflected in the Court's voting rights jurisprudence.<sup>305</sup>

The state might also argue that it is justified in failing to recognize racial bases for political association because racial identity is balkanizing and divisive. This argument, too, finds much support in the court's racial districting cases,<sup>306</sup> especially *Shaw I*.<sup>307</sup> Consequently, given the divisive nature of racial identity in our society, the state may argue that it should not recognize racial bases for political identification.

Lastly, the state might argue that it has a compelling interest in conveying the message that race should not be a basis for political identity. As the Court has often stated in its racial districting cases, when the state takes race into account in the designs of political structures of representation, it "convey[s] the message that political identity is, or should be, predominantly racial."<sup>308</sup> Commentators have referred to this conception of injury in the *Shaw I* line of cases as an "expressive harm."<sup>309</sup> "An expressive harm is one that results from the ideas or attitudes expressed through a governmental action, rather than from the more tangible or material consequences the action brings about."<sup>310</sup> The expressive harm in *Shaw I* was that the state used "race in the redistricting context in a way that subordinate[d] all other relevant values[;] the state . . . impermissibly endorsed too dominant a role for race."<sup>311</sup>

All of these grounds—colorblindness, divisiveness, and expressive harms—support the proposition that use of race in the design of electoral

303. See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1978) (Blackmun, J., concurring in part, dissenting in part) ("In order to get beyond racism, we must first take account of race. There is no other way.").

304. See *supra* text accompanying notes 83-87.

305. See *Miller v. Johnson*, 515 U.S. 900, 927-28 (1995); *Shaw v. Reno*, 509 U.S. 630, 657 (1993) (*Shaw I*) (criticizing racial gerrymandering as contrary to the goals of both the Fourteenth and Fifteenth Amendments and the nation as a whole). See also *Adarand Constructors v. Peña*, 515 U.S. 200, 239 (1995) (Scalia, J., concurring in part, concurring in judgment); *id.* at 240 (Thomas, J., concurring in part, concurring in judgment).

306. See *Miller*, 515 U.S. at 912; *Holder v. Hall*, 512 U.S. 874, 906-07 (1994) (Thomas, J., concurring); *Shaw I*, 509 U.S. at 657; *Wright v. Rockefeller*, 376 U.S. 52, 66-67 (1963) (Douglas, J., dissenting).

307. *Shaw I*, 509 U.S. at 657 (stating that using race as a basis for political identification "may balkanize us into competing racial factions").

308. *Bush v. Vera*, 517 U.S. 952, 980 (1996). See also *id.* at 999 (Kennedy, J., concurring); *Shaw I*, 509 U.S. at 647-49.

309. See generally Elizabeth S. Anderson & Richard H. Pildes, *Expressive Theories of Law: A General Restatement*, 148 U. PA. L. REV. 1503, 1539 (2000) ("The harms are expressive because they are not tied to material injuries to specific individuals in the same way that harms involved in conventional individual rights cases are tied to discrete injuries. . . . Rather, the problem is that certain districts convey the message that political identity is, or should be, predominantly racial."); Pildes, *supra* note 3, at 2505; Pildes & Niemi, *supra* note 41, at 506-15.

310. Pildes & Niemi, *supra* note 41, at 506-07.

311. *Id.* at 509.

structures violates the Fourteenth Amendment. The contention that race is an impermissible basis for state action undergirds not only the Court's voting rights jurisprudence<sup>312</sup> but also its Equal Protection Clause jurisprudence more generally.<sup>313</sup> As Professor Forde-Mazrui has observed, "the Court increasingly takes the normative position that race is irrelevant and unrelated, even statistically, to *any* other characteristics, and that government policies ought not act upon any assumptions to the contrary."<sup>314</sup> The Court has used the Fourteenth Amendment as a handmaiden in furthering its quest to eradicate race as a basis for official state decision making.<sup>315</sup> The voting rights context is only the latest frontier upon which this battle has been waged.

However, regardless of the merits or demerits of the use of race in other contexts, voting is different.<sup>316</sup> As Professor Pildes has explained,

[T]he challenge for . . . those who would endorse a categorical, *per se* bar on the use of race or race consciousness in the [design of electoral structures] . . . is to explain why, when majoritarian power is permissibly diffused to ensure more adequate representation of various minority interests in so many other settings, the singular interest for which this process should not be permitted—indeed, for which it should be constitutionally prohibited—is where the interest is defined in racial terms.<sup>317</sup>

This challenge becomes even more daunting when one factors important First Amendment interests into the analysis.

Until now, most commentators have assumed that an equality right is the only constitutional principle at issue in the design of electoral structures. Consequently, previous scholarship in this area has not discussed whether and to what extent the First Amendment affects the equality principle. I argue that where racial identity and political identity intersect, the state's invocation of an equality interest cannot automatically trump the individual's equally important liberty interest. In this Part, I review three cases that presented a compelling equality right—*Buckley v. Valeo*,<sup>318</sup> *R.A.V. v. St. Paul*,<sup>319</sup> and *Boy Scouts of America v. Dale*.<sup>320</sup> These cases

312. See *supra* text accompanying notes 18-90.

313. For a brief survey that also includes the Court's voting rights cases, see Kim Forde-Mazrui, *The Constitutional Implications of Race-Neutral Affirmative Action*, 88 GEO. L.J. 2331, 2354 (2000) ("All racial classifications are inherently 'suspect' and subject to strict scrutiny.").

314. *Id.* at 2355.

315. But see *Grutter v. Bolinger*, 123 S. Ct. 2325, 2338 (2003) ("Although all governmental uses of race are subject to strict scrutiny, not all are invalidated by it.").

316. Karlan & Levinson, *supra* note 11.

317. Richard H. Pildes, *Diffusion of Political Power and the Voting Rights Act*, 24 HARV. J.L. & PUB. POL'Y 119, 130 (2000).

318. 424 U.S. 1 (1976).

319. 505 U.S. 377 (1992).

320. 530 U.S. 640 (2000).



span the gamut of First Amendment doctrine. *Buckley* addressed political association and expression, *R.A.V.* dealt with free expression, and *Dale* grappled with expressive association. In each case, the First Amendment right superceded a very strong equality right.

A. *The Equality Right Cannot Automatically Trump the Liberty Right*

*Buckley v. Valeo* presented a First Amendment challenge to key amendments to the Federal Election Campaign Act of 1971.<sup>321</sup> The Act restricted the amount of money individuals, political parties, and political action committees could contribute to candidates seeking federal offices<sup>322</sup> and limited the amount of money they could spend on federal elections.<sup>323</sup> The plaintiffs challenged the Act on the grounds that it infringed their First Amendment rights to free speech and free association. The Court of Appeals for the District of Columbia Circuit largely upheld the amendments, with one exception,<sup>324</sup> on the grounds that two compelling governmental interests motivated the Act: "equaliz[ing] . . . the relative ability of all voters to affect electoral outcomes" and curbing the appearance of corruption in the financing of elections.<sup>325</sup>

The Supreme Court disagreed, holding that the "Act's contribution and expenditure limitations operate in an area of the most fundamental First Amendment activities."<sup>326</sup> It is useful to examine closely the Supreme

321. 424 U.S. at 6.

322. *Id.* at 7.

323. *Id.* at 7, 12-13.

324. *Buckley v. Valeo*, 519 F.2d 821 (D.C. Cir. 1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

325. *Id.* at 841. The Court of Appeals stated:

The principle of equality in political suffrage rights has the constitutional footing of the "one man, one vote" principle. . . . It would be strange indeed if, by extrapolation outward from the basic rights of individuals, the wealthy few could claim a constitutional guarantee to a stronger political voice than the unwealthy many because they are able to give and spend more money, and because the amounts they give and spend cannot be limited.

*Id.* (internal citations omitted).

326. *Buckley v. Valeo*, 424 U.S. 1, 14 (1976). The Court went on to explain that even though both the contribution and expenditure limitations implicate First Amendment interests, the limits on expenditures "impose significantly more severe restrictions" on First Amendment rights than the limits on contributions. *Id.* at 23. Although *Buckley* has been roundly criticized, the criticism has generally centered on the Court's decision to draw a line between expenditures and contributions. For example, Professor Briffault, one of the more perceptive and persistent critics of *Buckley*, nevertheless grants: "*Buckley* rightly reminded us that campaign finance involves speech and associational activities protected by the First Amendment." Richard Briffault, *Nixon v. Shrink Missouri Government PAC: The Beginning of the End of the Buckley Era?*, 85 MINN. L. REV. 1729, 1760 (2001) [hereinafter Briffault, *Beginning of the End*]. For a sample of some important criticism of *Buckley*, see John C. Bonifaz et al., *Challenging Buckley v. Valeo: A Legal Strategy*, 33 AKRON L. REV. 39 (1999); Richard Briffault, *Issue Advocacy: Redrawing the Elections/Politics Line*, 77 TEX. L. REV. 1751, 1759-64, 1774-76 (1999); Debra Burke, *Twenty Years After the Federal Election Campaign Act Amendments of 1974: Look Who's Running Now*, 99 DICK. L. REV. 357, 368-72 (1995); Harold Leventhal, *Courts and Political Thickets*, 77 COLUM. L. REV. 345, 370-71 (1977); Kirk J. Nahra, *Political Parties and the Campaign Finance Laws: Dilemmas, Concerns and Opportunities*, 56

Court's response to the equality interest and anticorruption-in-government interests in *Buckley*. The Court of Appeals described this equality right as follows:

By reducing in good measure disparity due to wealth, the Act tends to equalize both the relative ability of all voters to affect electoral outcomes, and the opportunity of all interested citizens to become candidates for elective federal office. This broadens the choice of candidates and the opportunity to hear a variety of views.<sup>327</sup>

Relatedly, the court emphasized the government's concern with corruption in campaign finance, events that also contributed to promulgation of the Act.<sup>328</sup> As the court understood the political context that spurred electoral reform, the "escalation of the 1972 election and the shock of its aftermath led to a call for comprehensive corrective measures."<sup>329</sup> The 1972 elections were embroiled in allegations of corruption and the undue influence of moneyed interests in politics. The rising costs of campaigns, the dependence of candidates on large donors, and the evidence of corruption were not lost on the citizenry.<sup>330</sup> Citing polling research from the University of Michigan's Center for Political Studies, the court documented a decade-long decline in political trust among the citizenry.<sup>331</sup>

This decline in political trust threatened to extinguish that which "nourishes and invigorates democracy": widespread participation in the political process.<sup>332</sup> From the perspective of the Court of Appeals, this strong equality right, animated by its public-regarding purpose, trumped any consideration of the liberty or associational interests claimed by the *Buckley* plaintiffs.<sup>333</sup> For that court, the availability or applicability of the First Amendment right inversely depended upon the compelling nature of the state's public-regarding and equality-reinforcing goal.

This approach stands in sharp contradistinction to the Supreme Court's approach. Whereas the Court of Appeals focused on the importance of the Act and its equalizing effect,<sup>334</sup> the Supreme Court focused on

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FORDHAM L. REV. 53, 67-76 (1987); Jamin Raskin & John Bonifaz, *Equal Protection and the Wealth Primary*, 11 YALE L. & POL'Y REV. 273, 314-30 (1993); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 610-12 (1982).

327. *Buckley v. Valeo*, 519 F.2d 821, 841 (1975), *aff'd in part, rev'd in part*, 424 U.S. 1 (1976).

328. *See id.* at 836-38.

329. *Id.* at 837.

330. *Id.* at 837-40.

331. *Id.* at 838-39.

332. *Id.* at 835.

333. *Id.* at 842 ("To the extent that prohibitions and restraints—imposed by the Act in service of the compelling government interest in insuring the integrity of federal elections against undue influence—work incidental restrictions on First Amendment freedoms, these constraints, broadly considered, are necessary to assure the integrity of federal elections.").

334. *Id.* at 835-42.

the First Amendment rights at stake.<sup>335</sup> The Court not only framed the question as implicating the First Amendment right to free speech<sup>336</sup> but also specifically drew attention to the effect of the campaign finance measures on the plaintiffs' right to "political association."<sup>337</sup> Whereas the Court of Appeals concluded that the Act's burden on associational and expressional rights was incidental,<sup>338</sup> the Supreme Court found that the Act placed "substantial and direct restrictions"<sup>339</sup> upon the right of expression and the right of association.<sup>340</sup> The Court stated that "the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment."<sup>341</sup> The Court ultimately concluded that the strength of the equality claim could not insulate the Act from First Amendment scrutiny.<sup>342</sup> In other words, the equality right did not automatically trump all other interests.

The Court reaffirmed the approach of *Buckley* in *R.A.V. v. St. Paul*,<sup>343</sup> and in *Boy Scouts of America v. Dale*.<sup>344</sup> In *R.A.V.*, the defendant was charged under a city antibias ordinance after he burned a cross in the yard of an African American family in St. Paul, Minnesota.<sup>345</sup> The defendant challenged the ordinance on First Amendment grounds. The Minnesota

335. *Buckley v. Valeo*, 424 U.S. 14, 48-49 (1976) (noting that the First Amendment does not tolerate restricting the speech of some for the benefit of others); Briffault, *Beginning of the End*, *supra* note 326, at 1734 ("But *Buckley* rejected the argument that campaign money could be restricted in the name of political equality, whether the equality of political influence among individuals or groups, or the equality of candidates' resources.").

336. *Buckley*, 424 U.S. at 14.

337. *Id.* at 15.

338. *Buckley*, 519 F.2d at 842.

339. *Buckley*, 424 U.S. at 58.

340. *Id.* at 18 (The "Act's contribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties.").

341. *Id.* at 48-49.

342. *But see* *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 401-02 (2000) (Breyer, J., concurring) (noting that "those words cannot be taken literally . . . [because] the Constitution often permits restrictions on the speech of some in order to prevent a few from drowning out the many"). Note the Supreme Court's response to the reliance of the Court of Appeals upon *United States v. O'Brien*, 519 F.2d at 840. In *O'Brien*, the Court stated that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *United States v. O'Brien*, 391 U.S. 367, 376 (1968). The Court in *Buckley* rejected the characterization of the campaign finance regulations as simply regulating conduct with only incidental burdens on First Amendment interests. 424 U.S. at 16-17.

343. 505 U.S. 377 (1992).

344. 530 U.S. 640 (2000).

345. 505 U.S. at 379-80. The statute provided:

Whoever places on public or private property a symbol, object, appellation, characterization or graffiti, including, but not limited to, a burning cross or Nazi swastika, which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender commits disorderly conduct and shall be guilty of a misdemeanor.

St. Paul, Minn. Legis. Code § 292.02 (1990).

Supreme Court upheld the charge and construed the ordinance to reach only "fighting words" based upon race, color, religion, or gender.<sup>346</sup> In the Minnesota Supreme Court's view, the Constitution did not protect these expressions.<sup>347</sup> It agreed with the city's defense of the ordinance as necessary to give effect to a compelling equality right and to guard the human rights of those historically subjected to discrimination.<sup>348</sup>

The United States Supreme Court reversed on many grounds, including the content-based discrimination in the ordinance.<sup>349</sup> Although the Court agreed that the state was regulating pursuant to a compelling interest,<sup>350</sup> it concluded that the state's means were not sufficiently narrowly tailored.<sup>351</sup>

In many respects, the issue of race consciousness in electoral structures is analogous to the issue of racist speech. Both problems pose difficult challenges to significant constitutional principles and reflect the "tension between the constitutional values of free speech and equality."<sup>352</sup> A strong equality claim motivates hate speech regulation.<sup>353</sup> Compelling evidence of the harm suffered by victims of hate speech justifies its regulation.<sup>354</sup> Moreover, the most vulnerable and marginalized members of our society bear the brunt of hate speech.<sup>355</sup> Yet, despite the Constitution's strong commitment to the principle of equality,<sup>356</sup> a commitment that should be particularly solicitous to the plight of African Americans, both

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346. *R.A.V.*, 505 U.S. at 380-81. Fighting words are "personally abusive epithets which, when addressed to the ordinary citizen, are, as a matter of common knowledge, inherently likely to provoke violent reaction." *Cohen v. California*, 403 U.S. 15, 20 (1971). See also EUGENE VOLOKH, *THE FIRST AMENDMENT: PROBLEMS, CASES, AND POLICY ARGUMENTS* 178 (2001).

347. *R.A.V.*, 505 U.S. at 380-81.

348. *Id.* at 395.

349. *Id.* at 391.

350. *Id.* at 395.

351. *Id.* at 395-96.

352. Lawrence, *supra* note 10, at 434.

353. See generally Delgado, *supra* note 10, at 140 n.40; Lawrence, *supra* note 10, *passim*; Matsuda, *supra* note 10, *passim*.

354. Delgado, *supra* note 10, at 143-49 (recounting harms of hate speech); Lawrence, *supra* note 10, at 457-66 (noting "psychic," "reputational," and "denial of equal educational opportunity" as injuries suffered by victims of hate speech); Matsuda, *supra* note 10, at 2336-41 (recounting harms of hate speech); Post, *supra* note 10, at 272-77 (recognizing five basic harms of racist speech).

355. See, e.g., Lawrence, *supra* note 10, at 472 ("Whenever we decide that racist hate speech must be tolerated because of the importance of tolerating unpopular speech we ask blacks and other subordinated groups to bear a burden for the good of society—to pay the price for the societal benefit of creating more room for speech."); Matsuda, *supra* note 10, at 2376 ("[W]hen victims of racist speech are left to assuage their own wounds, we burden a limited class: the traditional victims of discrimination. This class already experiences diminished access to private remedies such as effective counterspeech, and this diminished access is exacerbated by hate messages.").

356. See, e.g., Paul Brest, *In Defense of the Antidiscrimination Principle*, 90 HARV. L. REV. 1, 6 (1977) ("Stated most simply, the antidiscrimination principle disfavors race-dependent decisions and conduct—at least when they selectively disadvantage the members of a minority group.").

the Court and the academe have concluded that the equality claim is not sufficient to overcome the stronger First Amendment right.<sup>357</sup>

*Boy Scouts of America v. Dale* also presented a compelling equality right.<sup>358</sup> In *Dale*, James Dale, a former scout, sued the Boy Scouts after the organization revoked his membership when it learned he was gay.<sup>359</sup> Dale argued that his expulsion violated New Jersey's antidiscrimination statute.<sup>360</sup> The New Jersey Supreme Court agreed.<sup>361</sup> The court maintained that the state "has a compelling interest in eliminating 'the destructive consequences of discrimination from our society.'"<sup>362</sup> The Boy Scouts appealed to the United States Supreme Court and argued that forced inclusion of Dale would violate their right to expressive association.<sup>363</sup>

The United States Supreme Court held for the Boy Scouts. The Court explained that enforcement of the antidiscrimination principle would impermissibly curtail organization members' right of association.<sup>364</sup> It concluded that "[t]he state interests embodied in New Jersey's public accommodations law do not justify such a severe intrusion on the Boy Scouts' rights to freedom of expressive association."<sup>365</sup>

Each of these three cases presented a formidable equality claim. In each case, the state argued that its equality interest trumped the individual's First Amendment interest. In each case, the state lost. Extending the analysis to the design of electoral structures, the state cannot automatically use the equality principle to justify race blindness in the design of democratic structures where racial identity and political identity correlate. If the state unduly burdens an individual's First Amendment right, in this case a right to political association, the state cannot, on the grounds of promoting greater equality, deprive the individual of his or her right to associate.

I do not argue that the associational right invariably trumps the equality right. The equality right, depending upon the context and the electoral structure at issue, may be sufficiently compelling to overcome the individual's liberty right. My claim has two dimensions. First, the associational right is a relevant consideration in resolving the constitutionality of democratic structures. Second, the equality right does not automatically trump the

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357. See, e.g., Strossen, *supra* note 10, *passim*.

358. 530 U.S. 640 (2000).

359. *Id.* at 643-45.

360. *Id.* at 645.

361. *Id.* at 646.

362. *Id.* at 647 (quoting *Dale v. Boy Scouts of Am.*, 764 A.2d 1196, 1227 (N.J. 1999)). Moreover, in similar contexts the Court has held that antidiscrimination laws advance compelling state interests. See, e.g., *Roberts v. U.S. Jaycees*, 468 U.S. 609, 624 (1984) (stating that the state's "strong historical commitment to eliminating discrimination and assuring its citizens equal access to publicly available goods and services . . . plainly serves compelling state interests of the highest order").

363. 530 U.S. at 647.

364. *Id.* at 659.

365. *Id.*

associational right. What we have is a clash of two important and at times competing constitutional interests.<sup>1</sup>

*B. California Democratic Party v. Jones and the Importance of Political Association*

The equality right is an important constitutional right, but so is the associational right. Both should be considered seriously. *California Democratic Party v. Jones* shows the Court's attention to the associational right in particular.<sup>366</sup> In *Jones*, the plaintiffs challenged a California proposition that changed the state's primary election from a closed primary<sup>367</sup> to a blanket primary.<sup>368</sup> The district court held that the state's interest, which was to "enhance[] the democratic nature of the election process and the representativeness of elected officials," justified the proposition.<sup>369</sup> Writing for the Court, Justice Scalia concluded that the proposition imposed a severe burden on plaintiffs' right of political association.<sup>370</sup>

Because the state's electoral structure, the blanket primary, severely burdened plaintiffs' freedom of political association,<sup>371</sup> the Court rejected seven interests advanced as rationales for using the blanket primary: making elected officials more representative of their constituents, expanding political debate outside partisan boundaries, ensuring the effective voting rights of the disenfranchised, promoting fairness, increasing voter options, boosting voter participation, and protecting voter privacy.<sup>372</sup>

The Court summarily rejected the state's first two asserted interests—having more representative elected officials and expanding political debate—on the ground that they were "nothing more than a stark repudiation of freedom of political association."<sup>373</sup> It made clear that the state cannot burden the individual's associational right simply because the state does not like how the individual associates or the choices the

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366. 530 U.S. 567 (2000).

367. In a closed primary "only persons who are members of the political party . . . can vote" for the party's nominee. *Id.* at 569.

368. *Id.* at 571. In a blanket primary any eligible voter, whether a member of the party or not, may vote in the party's primary. *Id.* at 570.

369. *Cal. Democratic Party v. Jones*, 984 F. Supp. 1288, 1301 (E.D. Cal. 1997).

370. *Jones*, 530 U.S. at 577-80.

371. The Court stated:

Proposition 198 forces petitioners to adulterate their candidate-selection process—the "basic function of a political party"—by opening it up to persons wholly unaffiliated with the party. Such forced association has the likely outcome—indeed, in this case the *intended* outcome—of changing the parties' message. We can think of no heavier burden on a political party's associational freedom. Proposition 198 is therefore unconstitutional unless it is narrowly tailored to serve a compelling state interest.

*Id.* at 581-82 (internal citation omitted).

372. *Id.* at 582-86.

373. *Id.* at 582.

individual makes.<sup>374</sup> The Court rejected the third asserted interest, effective representation for the disenfranchised, on essentially the same ground.<sup>375</sup> It said that a state cannot favor the equality interests of disenfranchised persons over the interests of other citizens because doing so is tantamount to privileging one group of individuals "simply because the State supports it."<sup>376</sup> The Court rejected the remaining four interests on the grounds that they may not be sufficiently compelling and, even if they are compelling, the electoral structure is not narrowly tailored to advance them.<sup>377</sup> The Court thus concluded that California's proposition was unconstitutional because it violated citizens' right to political association.

*Jones*, one of the Court's most recent political association cases, indicates the Court's solicitude for political association. State electoral laws or structures that burden associational rights are unconstitutional unless they are narrowly tailored and serve a compelling state interest. As I have argued in this Part, although equality may be a compelling state interest, it does not ipso facto supercede the individual's associational right. In fact, if *Jones* is an accurate predictor of the Court's future analysis, states cannot construct electoral structures essentially on the grounds that they are uncomfortable with the fact that voters of color are associating on the basis of their race. Where states construct electoral structures and those structures burden the associational right of voters of color, the colorblindness rationale may not be a sufficiently compelling state interest to survive strict scrutiny.

## V

### IMPLICATIONS

I have argued thus far that the First Amendment ensures racial groups the right to meaningful participation in the political process. When state actors design democratic institutions, they must be race conscious if there is a functional relationship between racial and political identity. The equality right is compelling but does not presumptively overcome the individual's liberty right. The question then is to what extent a state must facilitate or maximize political identity along racial lines. Suppose one is concerned that bizarrely shaped districts inflict maximum costs on all other nonracial bases for political identification.<sup>378</sup> Are such concerns extraneous in light of the First Amendment right of political association? Moreover, what can a

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374. *Id.* (characterizing the state's position as tantamount to the proposition that "[p]arties should not be free to select their own nominees because those nominees, and the positions taken by those nominees, will not be congenial to the majority").

375. *Id.* at 583.

376. *Id.* at 584.

377. *Id.* at 585.

378. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993) (*Shaw I*) (using the term "bizarre districts" for the first time).

state do if it is concerned about the ostensibly corrosive role race may be playing in the polity? After all, as the Court made clear in *Miller v. Johnson*, the ultimate goal of the Equal Protection Clause is to end race-conscious decision making in political institutions.<sup>379</sup> For the Court, race consciousness is a temporary way station on the road to the Nirvana that is colorblindness.<sup>380</sup> Difficulties arise in designing democratic institutions that reconcile the First Amendment's liberty concerns with the Fourteenth Amendment's equality concerns. How should we resolve this clash of competing constitutional interests?

This Part argues that the Court can harmonize First and Fourteenth Amendment interests if it interprets the Constitution to rule out extreme outcomes that would violate the core concerns of both Amendments. Part V.A uses Justice Breyer's concurrence in *Nixon v. Shrink Missouri Government PAC*<sup>381</sup> and Part V.B uses the Court's decision in *Easley v. Cromartie (Cromartie II)*<sup>382</sup> to illustrate how the Court can balance these competing concerns.

#### A. Justice Breyer's Pragmatic Balancing Approach

In *Shrink Missouri*, the Supreme Court upheld a Missouri statute that restricts campaign contributions to various statewide offices.<sup>383</sup> The Court reversed the Court of Appeals for the Eighth Circuit, which had applied strict scrutiny in reviewing the statute and had concluded on evidentiary grounds that the state's interest in preventing corruption could not justify the limits promulgated by the statute.<sup>384</sup> The Court held that limits on campaign contributions did not raise the types of First Amendment concerns raised by limits to campaign expenditures.<sup>385</sup> Consequently, the Court essentially reaffirmed the approach to campaign finance reform enunciated in *Buckley*.<sup>386</sup>

Perhaps the most interesting aspect of the case is the exchange between Justices Breyer and Thomas on the soundness of the Court's continued adherence to *Buckley*.<sup>387</sup> Justice Thomas would apply strict scrutiny to campaign contribution limitations and presumably all campaign finance regulation that infringes upon what he views as core political

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379. 515 U.S. 900, 927 (1995).

380. This is one way to read the following statement by Justice Blackmun in *Bakke*: "In order to get beyond racism, we must first take account of race. There is no other way." *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265, 407 (1977) (Blackmun, J., concurring in part, dissenting in part).

381. 528 U.S. 377 (2000).

382. 532 U.S. 234 (2001).

383. 528 U.S. at 382-83.

384. *Id.* at 384; *Shrink Mo. Gov't PAC v. Adams*, 161 F.3d 519, 521-22 (8th Cir. 1998).

385. *Shrink Missouri*, 528 U.S. at 391-92.

386. Briffault, *Beginning of the End*, *supra* note 326, at 1729 (noting that *Shrink Missouri* reaffirmed a key element of *Buckley*).

387. Compare *Shrink Missouri*, 528 U.S. at 399 (Breyer, J., concurring), with *id.* at 410 (Thomas, J., dissenting).



regulation that infringes upon what he views as core political speech.<sup>388</sup> He reasoned that “[p]olitical speech is the primary object of First Amendment protection”<sup>389</sup> and that “a self-governing people depends upon the free exchange of political information.”<sup>390</sup>

Justice Breyer purported to accept these premises but reached a different conclusion.<sup>391</sup> He recognized that the issue raised competing protected interests.<sup>392</sup> On one side of the equation:

Through contributions the contributor associates himself with the candidate’s cause, helps the candidate communicate a political message with which the contributor agrees, and helps the candidate win by attracting the votes of similarly minded voters. . . . Both political association and political communication are at stake.<sup>393</sup>

On the other side:

[R]estrictions upon the amount any one individual can contribute to a particular candidate seek to protect the integrity of the electoral process—the means through which a free society democratically translates political speech into concrete governmental action. . . . Moreover, by limiting the size of the largest contributions, such restrictions aim to democratize the influence that money itself may bring to bear upon the electoral process.<sup>394</sup>

Consequently, he could not support a per se presumption that campaign finance measures are unconstitutional.<sup>395</sup>

For Justice Breyer, “simple test[s]” of constitutionality are inappropriate because campaign finance reform “significantly implicates competing constitutionally protected interests in complex ways.”<sup>396</sup> Instead, the Court should balance the competing interests: “[I]n practice that has meant asking whether the statute burdens any one such interest in a manner out of proportion to the statute’s salutary effects upon the others (perhaps, but not necessarily, because of the existence of a clearly superior, less restrictive alternative).”<sup>397</sup> Justice Breyer acknowledged that these are difficult judgments. Consequently, he advocated deference to the decisions of the

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388. See *id.* at 410 (Thomas, J., dissenting) (stating that “our decision in *Buckley* was in error, and I would overrule it. I would subject campaign contribution limitations to strict scrutiny, under which Missouri’s contribution limits are patently unconstitutional”); see also *id.* at 412.

389. *Id.* at 410–11.

390. *Id.* at 411.

391. *Id.* at 400 (Breyer, J., concurring) (“If the dissent believes that the Court diminishes the importance of the First Amendment interests before us, it is wrong. The Court’s opinion does not question the constitutional importance of political speech or that its protection lies at the heart of the First Amendment.”).

392. *Id.*

393. *Id.* (citation omitted).

394. *Id.* at 401 (citations omitted).

395. *Id.*

396. *Id.* at 402.

397. *Id.*

legislature, particularly for election regulation, which falls within a legislature's institutional knowledge.<sup>398</sup> However, plaintiffs can overcome the presumption of constitutionality where a regulation "work[s] disproportionate harm" upon other constitutional values.<sup>399</sup>

Justice Breyer's pragmatic approach to campaign finance reform may provide a means for resolving the liberty and equality tensions inherent in the design of electoral structures. It is important to recognize, as Justice Breyer did in the context of campaign regulation, that the design of democratic structures of representation "implicates competing constitutionally protected interests in complex ways."<sup>400</sup> The Court and commentators have focused on the equality interests at stake, but, as this Article argues, electoral structures implicate important liberty interests as well.

It is also important to recognize that legislatures are fairly adept at making these difficult judgments.<sup>401</sup> Moreover, legislatures must have some leeway in reasonably accommodating conflicting interests. Thus, courts should defer to the empirical findings of legislatures unless the legislation works a disproportionate harm upon an identifiable constitutional value.

But what does it mean to work a disproportionate harm upon an identifiable constitutional value? As I have explained elsewhere,

Constitutionalization of democratic politics—and consequently judicial supervision of the political process—finds its strongest justification when democratic practices do not serve any legitimate ends and violate multiple democratic principles. Conversely, judicial supervision of the political process is least justified (if at all) where democratic practices serve democratic ends and judicial review does not vindicate any democratic principles.<sup>402</sup>

Thus, when the design of democratic structures admittedly serves multiple constitutional ends, though not all constitutional ends equally, judicial supervision should take place at the margin. The racial districting cases, and in particular *Cromartie II*, nicely illustrate how this balancing can work.

### *B. Application of Justice Breyer's Balancing Approach in Racial Districting Cases*

One can understand the racial districting cases as staking out an absolute equality position: race consciousness violates the Constitution and must be stamped out whatever the context. Where state actors are not

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398. *Id.*

399. *Id.*

400. *Id.* at 402.

401. *Gaffney v. Cummings*, 412 U.S. 735, 750-51 (1973); *see also* Fuentes-Rohwer, *Doing Our Politics in Court*, *supra* note 262, *passim*.

402. Guy-Uriel E. Charles, *Constitutional Pluralism and Democratic Politics: Reflections on the Interpretive Approach of Baker v. Carr*, 80 N.C. L. REV. 1103, 1106 (2002).

colorblind in the design of democratic structures, the Court must step in and enforce the equality norm. However, as this Article has demonstrated, this position does violence to the competing and equally important constitutional value of political association. Consequently, under Justice Breyer's balancing approach, a strict per se presumption of unconstitutionality is not warranted and the Court should give effect to both values.

An alternative understanding of the racial gerrymandering cases is that "uber-race consciousness,"<sup>403</sup> or what Justice O'Connor has referred to as "extreme instances of gerrymandering,"<sup>404</sup> wreak maximum havoc on other constitutional values.<sup>405</sup> Or, in Justice Breyer's terms, uber-race consciousness works disproportionate harm upon the equality principle. Uber-race consciousness completely subordinates the equality interest to the liberty interest.<sup>406</sup> Instead, the Court must find some way to reconcile the competing interests. Justice Breyer's opinion in *Cromartie II* is a useful guide to doing so.

In *Cromartie II*, perhaps to the surprise of many,<sup>407</sup> the United States Supreme Court disagreed with the findings of a three-judge district court that race was the predominant factor motivating the North Carolina Legislature in its creation of the Twelfth Congressional District.<sup>408</sup> The opinion is remarkable not only for its result but also for the extensiveness with which the Court reviewed the district court's factual findings.<sup>409</sup> As Justice Thomas correctly observed in dissent, the Court's review of the district court's decision was much more searching than is usually warranted by the clear error standard.<sup>410</sup>

403. Charles & Fuentes-Rohwer, *supra* note 3, at 241.

404. *Miller v. Johnson*, 515 U.S. 900, 929 (1995) (O'Connor, J., concurring).

405. This is the key point advanced by Professors Pildes and Niemi, in an early article on *Shaw I*; they called this approach "value reductionism." As they explained:

When decisions reflect value reductionism, policymakers have transformed a decision process that ought to involve multiple values—as a matter of constitutional law—and reduced it to a one-dimensional problem. They have permitted one value to subordinate all other relevant values. As a result, the decisionmaking process appears tainted because it has become compromised through unconstitutional oversimplification. . . . *Shaw I* [I]s best understood, we believe, as an opinion condemning value reductionism. In the Court's view, the process of designing election districts violates the Constitution not when race-conscious lines are drawn, but when race consciousness dominates the process too extensively.

Pildes & Niemi, *supra* note 41, at 500. As this Article demonstrates, value reductionism is a two-way street.

406. See *id.* at 500-01.

407. Professor Fuentes-Rohwer and I had argued in favor of the result reached by the Court and called for the reversal of the three-judge court on the grounds later identified by the Court in *Cromartie II*, but we did not expect it to happen. See Charles & Fuentes-Rohwer, *supra* note 3, at 257.

408. *Easley v. Cromartie*, 532 U.S. 234, 237 (2001).

409. See Melissa L. Saunders, *A Cautionary Tale: Hunt v. Cromartie and the Next Generation of Shaw Litigation*, 1 ELECTION L.J. 173, 182 (2002) ("The most striking feature of the Court's decision is the intensity with which it reviews the district court's finding that race was the predominant factor in the design of District 12.")

410. *Cromartie II*, 532 U.S. at 259-60 (Thomas, J., dissenting) ("The Court does cite cases that address the correct standard of review . . . and does couch its conclusion in 'clearly erroneous'

There are a number of plausible explanations for the Court's decision to engage in an uncharacteristically searching review of the district court's decision.<sup>411</sup> One explanation is the district court's failure to defer to the state in light of the state's attempt to "balance competing interests."<sup>412</sup> Justice Breyer's opinion emphasized two important facts. First, the underlying decision was within the scope of the legislature's role.<sup>413</sup> Courts must permit legislatures to exercise their judgment when legislatures are legislating within the scope of their discretion.<sup>414</sup> Second, because the state had "articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated," the Court had to be particularly cautious in questioning the state legislature's determination.<sup>415</sup> The district court ignored these concerns in its haste to vindicate the equality principle.

Justice Breyer recognized that the state's districting plan was not an irrational act. The state was attempting to protect multiple constitutional interests. Where the design of democratic structures reflects an effort to give effect to multiple constitutional values, courts must defer to the judgment of state actors. This deference enables both courts and legislatures to balance competing constitutional claims but preserves judicial review to enforce constitutional norms. In this respect *Shaw I* and *Cromartie II* can be viewed as bookends of the Court's racial districting doctrine. *Shaw I* and perhaps *Miller* are best characterized as the Court's response to the concern that bizarre electoral line drawing inflicts maximum harm on equality principles. That is, bizarre districts may reflect excessive manipulation of racial identity by political actors or undue race essentialism.<sup>416</sup> Thus, *Shaw I* demonstrated the Court's determination to police those excesses of the political process.<sup>417</sup> *Cromartie II* acknowledged that when state actors draw lines with race-conscious intent, they are not necessarily doing so in a manner that inflicts maximum harm on equality principles or overly disrupts nonracial bases for political identification. Judicial invalidation is unwarranted in these types of cases.

Incorporating Justice Breyer's pragmatic approach into the domain of democratic politics demonstrates how the Court can give effect to the associational interest of voters of color while at the same time accounting for other constitutional values. Just as the state may violate the Constitution's

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terms. . . . But these incantations of the correct standard are empty gestures, contradicted by the Court's conclusion that it must engage in 'extensive review.'") (internal citations omitted).

411. For some persuasive explanations, see Saunders, *supra* note 409, at 182-88.

412. *Cromartie II*, 532 U.S. at 242 (quoting *Miller v. Johnson*, 515 U.S. 900, 915 (1995)).

413. *Id.*

414. *Id.* (quoting *Miller*, 515 U.S. at 915).

415. *Id.*

416. See *supra* text accompanying notes 37-90.

417. Charles & Fuentes-Rohwer, *supra* note 3, at 302.

equality norm by the manner in which it designs electoral structures, so too may it violate the Constitution's associational norm when its structures of representation do not accord due respect to the associational right. When the state designs electoral structures, state actors assign representation and allocate political power on the basis of criteria chosen by political elites.<sup>418</sup> While the use of race as a controversial criterion in the design of electoral structures has long been noted,<sup>419</sup> scholars are increasingly questioning other criteria state actors employ in the design of electoral structures.<sup>420</sup> Sometimes the chosen criteria map nicely onto the political identities of the relevant electorates. Most of the time they do not, particularly when the electorate is heterogeneous and composed of multiple and crosseutting social identities.

As some commentators have recognized, districting exacerbates this problem.<sup>421</sup> A state cannot district in a way that provides all groups—based on race, gender, religion, class, and so forth—a chance to associate.<sup>422</sup> Districting forces a choice among these identities and leaves that choice to self-interested political actors. Districting compels state actors to select among competing identities and decide which identities are salient, and thus pick out which groups are worthy of political power. Districting also aggravates the essentialism and balkanization concerns that so animate the Court's voting rights jurisprudence.<sup>423</sup> Moreover, the process may contribute to the racialization of politics by priming racial identities and making race the relevant criterion for political evaluation.

This need not be the state of affairs. Commentators have long recognized that alternative voting structures facilitate representation, minimize the constitutional costs identified by the Court's racial gerrymandering cases, and allow individuals to identify politically on the basis of characteristics they deem salient—whether the characteristics are racial, social, or political.<sup>424</sup> Consider once more Figure 4.<sup>425</sup> Assume that the numerical minority depicted in Figure 4 as Blissians of color are instead farmers with

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418. Issacharoff, *supra* note 42, at 903-04.

419. See generally ABIGAIL M. THERNSTROM, *WHOSE VOTES COUNT? AFFIRMATIVE ACTION AND MINORITY VOTING RIGHTS* (1987); Butler, *supra* note 6.

420. See, e.g., Issacharoff, *Gerrymandering*, *supra* note 258, at 642 ("The *Shaw* line of cases imposes constitutional scrutiny on only one particular outcome in the process of insider-controlled districting but leaves the structural problems of incumbent entrenchment and the erosion of political competition uncorrected."); see also Sally Dworak-Fisher, *Drawing the Line on Incumbency Protection*, 2 MICH. J. RACE & L. 131, 169-72 (1996).

421. See, e.g., GUINIER, *supra* note 268, at 74; Tucker, *supra* note 262, at 383.

422. GUINIER, *supra* note 268, at 97-101.

423. Consider Alan Gartner's account of his experience, as the Executive Director of New York City's Districting Commission, in attempting to draw district lines to facilitate representation among African American, Latino, Asian American, and gay and lesbian groups. See Gartner, *supra* note 274, at 369-73.

424. See, e.g., GUINIER, *supra* note 268, at 137-56.

425. See *supra* p. 1245.

distinct political interests. That is, their socioeconomic characteristic correlates with their political identity and the socioeconomic characteristic is salient. I have argued in this Article that the plan represented in Figure 4 would violate the associational rights of Blissians of color. The conclusion is no less true if those Blissians are instead a district group with different political preferences. The state should not be permitted to deprive our hypothetical farmers of any representation because the state has chosen to use districting as its electoral structure. This observation is particularly powerful when other alternative electoral structures are available.

How then should courts respond to this state of affairs? Should they constitutionally mandate alternative voting structures? Not necessarily. They can follow the Court's lead in the *Shaw* line of cases to take the right of association seriously. Just as a race-conscious bizarre district indicates that the state has impermissibly elevated the role of race in the political process, single-member districting—and, depending upon the context, districting itself—may indicate the state's failure to sufficiently protect associational rights. That is, one can view single-member districting as inflicting maximum harm on the associational right in the same way that the Court views race-conscious bizarre districts vis-à-vis the equality right.

Consider also the idea that the benefits of districting are unclear. The traditional justification, that districting facilitates representation by enabling the representative easily to meet with his or her constituents, no longer suffices.<sup>426</sup> Outside of the representational benefits of districting, its primary justification is interest aggregation and the subsidiary presumption that geography tracks interest.<sup>427</sup> However, in many cases, geography is not coextensive with interest and is a poor proxy for it. In these cases, there is no compelling reason for courts to defer to state actors where districting is the structure at issue.

We could characterize this default rule as a prophylactic rule.<sup>428</sup> Where states use districting as the electoral structure of choice—particularly where the state's electorate is not homogeneous—courts should apply a presumption of unconstitutionality on the ground that these districts violate the complainant's right of association. Districting itself, just like bizarreness, would signal the constitutional violation. Notice also

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426. DENNIS F. THOMPSON, JUST ELECTIONS: CREATING A FAIR ELECTORAL PROCESS IN THE UNITED STATES 40 (2002) ("[T]erritorial factors (such as geographical divisions) are legitimate criteria because districts should be compact enough to enable representatives to meet in person with their constituents. These criteria have less weight than in the past, when travel and communication were more difficult.").

427. *Id.*

428. See Issacharoff, *Gerrymandering*, *supra* note 258, at 641-48 (recommending prophylactic approach to redress problem in incumbent-protecting gerrymanders and lack of political competition in redistricting process); Saunders, *supra* note 11, at 1606 (arguing that *Shaw I* can be understood as a "'prophylactic' measure that overprotects individual constitutional rights in some cases in order to ensure adequate protection of those rights across a range of cases").

that an important benefit of this rule is that it would give effect to both equality and associational rights.

Importantly, the state need not be left without a safe harbor. States can adopt alternative structures. These structures would at the very least accomplish the state's goals without the attendant costs of districting. When states adopt alternative structures of representation, courts may respond, depending upon the context, with a presumption that state actors are pursuing multiple goals and defer to the legislature's expertise.

Thus, although electoral structures may not maximize the political power of relevant groups and need not do so to survive scrutiny under an associational right analysis, courts should be wary when the structures shut an identifiable group out of the process. Courts should not defer to a state's choice of structure if the state could have employed an alternative, less onerous electoral structure and at the same time accomplished its legitimate goals. Courts should prefer structures that facilitate free associational choices instead of those, such as districting, that depend upon the state to apportion political power among groups.<sup>429</sup>

### CONCLUSION

This Article demonstrates the importance of considering the First Amendment right of political association when deciding whether race is a proper basis for political consideration. I have argued that state actors cannot be colorblind in the design of electoral structures when the state's decision to be colorblind significantly infringes upon the associational rights of voters of color. State actors must make it possible for racial groups to aggregate their voting power as racial groups where race and political identity are correlated.

The essential underlying inquiry is who decides whether race is a permissible basis for political identification. The clear answer of the First Amendment is that the individual decides. The state's purpose should not be to try to remove race as a factor in American politics; instead, this choice should be left to individuals.

Although the equality ideal is a worthy enterprise, we cannot pursue it at the expense of equally worthy First Amendment interests. The Court should strive to balance these competing interests by recognizing the First Amendment values at stake and by providing state actors some leeway when they are regulating pursuant to legitimate interests.

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429. To be clear, I am not advocating alternative structures as the panacea to all that ails democratic politics. The narrower point is that the First Amendment is not indifferent to the state's choice of electoral structures if the state's choice infringes upon the individual's right to political association and an alternative structure is available that would suit the state's goals but would not infringe upon the individual's constitutional right.

Further, if individuals are to make meaningful decisions, electoral structures should promote free association. Consequently, the Supreme Court should be suspicious of electoral structures that depend upon the ability of state actors to recognize and give effect to politically salient characteristics.